

Liability for Workplace Psychiatric Injury in Australia: New Coherence and Unresolved Tensions

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Abstract

Workplace psychiatric injury is a significant health, economic and social problem. Multiple recent inquiries and reports have drawn attention to the failure of Australian law, including workplace health and safety ('WHS') regulation and compensation laws, to adequately respond to workplace psychiatric injury. This article considers how Australian negligence law has responded to workplace psychiatric injury since the High Court took a restrictive approach in 2005 in *Koehler v Cerebos (Australia) Ltd*. It considers the role of workplace psychosocial hazards in psychiatric injury and the changing Australian WHS landscape, including the evolution of Australian principles of negligence following *Koehler*. The 2022 High Court decision in *Kozarov v Victoria* which concerned injury from vicarious trauma is analysed and the tensions and unresolved issues post *Kozarov* are considered. The article argues that while Australian negligence law has experienced some change of direction post *Kozarov*, the failure of the High Court to overrule *Koehler* means it may remain difficult for some injured employees to recover for their workplace psychiatric injuries. Further development of negligence law is required in a way which promotes coherence with the Australian legislative regulatory landscape, and which adequately recognises the nature of workplace psychosocial hazards.

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I Introduction

Workplace psychiatric injury is a significant health, economic and social problem. The cost to the Australian economy of poor psychosocial workplace climates is approximately \$6 billion per annum.¹ A 2014 study by Beyond Blue found that only about half of Australian employees considered their workplace was mentally healthy.² On average, there are around 10,000 accepted workers compensation claims for psychiatric injury or illness each year, the majority of which involve extended periods of absence from the workplace.³ While the number and overall cost of all ‘serious injury’ workers compensation claims⁴ have fallen over the past decade,⁵ the number and costs of mental injury claims have grown exponentially.⁶ Serious mental health-related claims rose 73% between 2000 and 2020.⁷ Median time lost in working weeks for mental health conditions ‘rose 175%, from 11.2 working weeks in 2000–01 to 30.8 weeks in 2019–20’.⁸ Median compensation for mental health conditions rose 288% from \$14,300 in 2000–01 to \$55,300 in 2019–20.⁹ Mental stress claims had the highest median compensation amount of all injuries — ‘more than three times the median compensation amount for all serious claims’.¹⁰

Many people who suffer psychiatric injury in the workplace remain uncompensated. Psychiatric injury claims are treated differently from physical injury claims.¹¹ State and territory workers compensation schemes reject 24–60% of psychiatric injury claims, compared to 6–10% of physical injury and disease claims.¹² Workplace psychiatric injury is suffered at a disproportionately higher rate by women, particularly in sub-categories of mental stress such as work-related harassment, workplace violence, bullying and work pressure where women suffer

¹ Harry Becher and Maureen Dollard, *Psychosocial Safety Climate and Better Productivity in Australian Workplaces: Costs, Productivity, Presenteeism, Absenteeism* (Report, November 2016) 5.

² Beyond Blue, *State of Workplace Mental Health in Australia* (Report, 2014) 1.

³ Safe Work Australia, *Taking Action: A Best Practice Framework for the Management of Psychological Claims in the Australian Workers’ Compensation Sector* (2017) 9.

⁴ Claims that resulted in at least one week’s absence from work.

⁵ The frequency of serious claims declined overall by 17% between 2010–11 and 2019–20: see Safe Work Australia, *Key Work and Safety Statistics, Australia 2022* (Report, January 2023) 6.

⁶ The number of accepted mental health condition serious claims for 2020–21 was 12,155, representing 9% of all serious claims overall. This was made up of 6,899 female claims (14% of all female serious claims) and 5,244 male claims (7% of all male serious claims): Safe Work Australia *ibid* 10. See also Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces: Indicators from Accepted Workers’ Compensation Claims* (Annual Statement, 2021) 1 (Figure 1) which notes some decline in claims frequency between 2002 and 2014, but with claims rising again between 2016 and 2019.

⁷ Safe Work Australia, *Australian Workers’ Compensation Statistics 2020–21* (Report, December 2022) 37.

⁸ *Ibid* 51.

⁹ *Ibid* 52.

¹⁰ *Ibid* 54 (Table 40).

¹¹ Productivity Commission, *Mental Health: Inquiry Report* (Report No 95, June 2020) vol 2, 310. See discussion of how workers compensation schemes restrict compensation recovery for psychiatric injury claims: at 312–14. See also Safe Work Australia, *Comparison of Workers’ Compensation Arrangements in Australia and New Zealand: 2021* (Report, August 2022) 204–8 (Table 4.18).

¹² Productivity Commission (n 11) 310.

injuries at more than twice the rate of men.¹³ Rates of workplace psychiatric injury and claims differ widely between different industries.¹⁴ The average overall incident rates of serious accepted claims over five years for injuries caused by mental stress are highest in public administration and safety services (including police, fire fighters, emergency services personnel, corrections officers, border control officers); health care and social assistance professionals; and education and training professionals.¹⁵ Occupations with very high rates of work-related harassment and bullying include clerical and administrative workers; defence force members, police and fire fighters; and labourers.¹⁶

There is increasing awareness that workplace psychiatric injury in Australia requires an urgent response. The risk of psychiatric injury in the workplace due to employer-controlled psychosocial hazards¹⁷ has been known for many years.¹⁸ However, multiple recent government inquiries and reports have drawn attention to the failure of Australian law, including workplace health and safety ('WHS') regulation and compensation laws, to adequately recognise, respond to and compensate workplace psychiatric injury. These include the 2019 report by the Senate Education and Employment References Committee on the mental health and suicides of first responders;¹⁹ the 2020 report by the Productivity Commission on mental health;²⁰ the 2021 report of the Royal Commission into Victoria's Mental Health System;²¹ the 2018 review of the model WHS laws ('Boland Review');²² the 2020 report of the Australian Human Rights Commission ('AHRC') on the inquiry into sexual harassment in Australian workplaces ('*Respect@Work*');²³ the 2022 AHRC report on the independent review into Commonwealth parliamentary

¹³ Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces* (n 6) 2. See also Australian Human Rights Commission ('AHRC'), *Everyone's Business: Fourth National Survey on Sexual Harassment in Australia Workplaces* (Report, September 2018) 8 (which showed disparity between sexes in sexual harassment in the workforce).

¹⁴ Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces* (n 6) 3 (Figures 3, 4).

¹⁵ Productivity Commission (n 11) 312 (Figure 7.6).

¹⁶ Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces* (n 6) 3 (Figures 3, 4).

¹⁷ Psychosocial hazards are hazards that arise from 'the design or management of work, the working environment, plant ... or workplace interactions and behaviours' which 'may cause psychological and physical harm': Safe Work Australia, *Managing Psychosocial Hazards at Work: Code of Practice* (July 2022) cl 1.1.

¹⁸ Kylie Burns, 'Employers Behaving Badly? Negligence Claims for Work-Related Psychological Health' (2006) 77 *Precedent* 10, 10–11 nn 2–13.

¹⁹ Senate Education and Employment References Committee, Parliament of Australia, *The People behind 000: Mental Health of Our First Responders* (Report, 2018).

²⁰ Productivity Commission (n 11).

²¹ Penny Armytage AM, Allan Fels AO, Alex Cockram and Bernadette McSherry, *Royal Commission into Victoria's Mental Health System* (Final Report, February 2021) vol 2, 49–71.

²² Marie Boland, *Review of the Model Work Health and Safety Laws* (Final Report, December 2018) 34 ('*Boland Review Report*').

²³ AHRC, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 441–616.

workplaces;²⁴ and the 2022 Western Australian Legislative Assembly Report on sexual harassment in the fly-in fly-out mining industry.²⁵

This article considers how Australian negligence law has responded to workplace psychiatric injury since the High Court took a restrictive approach to liability in 2005 in *Koehler v Cerebos (Australia) Ltd*.²⁶ Part II considers, as background, the role of workplace psychosocial hazards in psychiatric injury and the changing WHS regulatory landscape in Australia. Part III discusses the principles of negligence following *Koehler*. It suggests that the restriction of employer liability for injury by courts has been problematic. Factors contributing to the restriction of liability have included: the construction of workplace psychiatric injury as predominantly caused by individual employee factors rather than workplace psychosocial hazards; the principle of the coherence of negligence law with other areas of law, particularly contract; and legal policy factors including privacy and individual autonomy.²⁷ Part IV analyses the 2022 High Court decision in *Kozarov v Victoria*²⁸ concerning vicarious trauma — that is, trauma suffered by exposure to the trauma and suffering of others. Part V considers tensions and unresolved issues in negligence law post *Kozarov*. The article argues that while Australian negligence law has changed direction post *Kozarov*, the failure of the High Court to overrule *Koehler* means it may remain difficult for some injured employees to recover for their workplace psychiatric injuries. Further development of negligence law in a way which promotes coherence with the Australian legislative regulatory landscape, and which adequately recognises the nature of workplace psychosocial hazards, is required.

II Psychosocial Hazards and Australia's Changing Regulatory Landscape

A Psychosocial Hazards and Workplace Psychiatric Injury

The recent history of negligence cases involving workplace psychiatric injury in the United Kingdom and in Australia reveals a focus on factors particular to an injured employee, including individual vulnerability, as the dominant cause of workplace psychiatric injury.²⁹ There has been far less focus by courts on workplace psychosocial risk factors or hazards controlled by the employer.³⁰ Two decades ago,

²⁴ AHRC, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Report, November 2021) 257–69.

²⁵ Community Development and Justice Standing Committee, Parliament of Western Australia, *'Enough is Enough': Sexual Harassment against Women in the FIFO Mining Industry* (Report No 2, June 2022).

²⁶ *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 (*'Koehler'*).

²⁷ Leeming JA referred in *New South Wales v Briggs* (2016) 95 NSWLR 467, 519 to human dignity, privacy and autonomy as 'enduring values within the legal system' (at [225]) which are reflected in negligence law as part of the task of 'achieving coherence in the law' (at [227]).

²⁸ *Kozarov v Victoria* (2022) 273 CLR 115 (*'Kozarov'*).

²⁹ For discussion of the United Kingdom context, see Anne Davies, 'Stress at Work: Individuals or Structures?' (2021) 51(2) *Industrial Law Journal* 403, 427.

³⁰ *Ibid.*

in her influential judgment in *Hatton v Sutherland*,³¹ Hale LJ viewed workplace stress as primarily related to the individual employee's characteristics or responses. This encompassed 'situations where people feel powerless or trapped' and mismatches between job pressures and a person's ability to meet those pressures.³² The role of employers, their knowledge of the risks of workplace psychological harm, and their ability to respond to potential harm were minimised.³³ Hale LJ suggested that an individual experiencing harmful levels of 'stress' had 'to make some decisions about how to respond'³⁴ and that the 'employer's room to manoeuvre may' be limited.³⁵ Psychological pressures were seen as 'inevitable in all jobs' and it was difficult to identify which jobs were so stressful as to cause harm, and to which employees.³⁶ Foreseeability of the specific risk of injury to an individual was held to depend both on the nature and extent of the work being done *and* on signs from the individual employee of harm to their health.³⁷

This understanding of workplace psychiatric injury — as predominantly caused by an individual's own characteristics or failure to cope with work pressures — has been reflected in case law in the United Kingdom and in Australia since the *Hatton* case.³⁸ However, it is not congruent with decades of research in organisational psychology, health and occupational health and safety ('OH&S') that finds that workplace psychiatric injury is caused by the complex interaction of organisational, environmental and individual factors.³⁹ By the early 2000s, WHS regulatory bodies in the United Kingdom and Australia had extensive material on their websites, and in guidelines for employers, notifying employers about organisational and workplace risk factors that impact employee psychiatric health.⁴⁰ Employers were notified of their obligation to assess and respond to those risk factors as part of their duties under WHS legislation.⁴¹

Psychosocial hazards within employer control which significantly impact the risk of workplace psychiatric injury include the nature of the work, workplace support, environmental and organisational factors.⁴² 'Common psychosocial hazards' include: 'high job demands' (for example high workloads, excessive work hours, high emotional load, unpleasant or hazardous work conditions, high work intensity, shiftwork and fatigue); 'low job demands'; 'low job control' or poor role clarity; poor workplace support; 'poor workplace relationships' (for example

³¹ *Hatton v Sutherland* [2002] 2 All ER 1 ('*Hatton*'), subsequently adopted by the House of Lords in *Barber v Somerset County Council* [2004] 1 WLR 1089.

³² *Hatton* (n 31) 9 [10].

³³ *Ibid* 9 [11].

³³ *Ibid* 9 [10].

³⁴ *Ibid*.

³⁵ *Ibid*.

³⁶ *Ibid* 10 [12]. Hale LJ rejected an argument that stress was so prevalent in some occupations that all employers should have a system in place: at 10 [16].

³⁷ *Ibid* 14 [26]–[27] (Hale LJ).

³⁸ See discussion in Davies (n 29). See also *Koehler* (n 26) 54–5 [24] (McHugh, Gummow, Hayne and Heydon JJ).

³⁹ Burns, 'Employers Behaving Badly?' (n 18). See also Davies (n 29) 406–12.

⁴⁰ Burns, 'Employers Behaving Badly?' (n 18).

⁴¹ *Ibid*.

⁴² Productivity Commission (n 11) 298–9.

bullying, aggression, harassment, conflict, lack of fairness, lack of organisational justice); 'poor organisational change management'; lack of positive feedback and reward; 'poor environmental conditions' (for example poor air quality, excessive noise, unsafe temperatures); remote work or isolation (for example fly-in fly-out ('FIFO') work); and exposure to violence or trauma.⁴³ There are a range of factors which may make a particular employee more susceptible to workplace psychiatric injury, including: being a new or young worker; having an existing disability or illness; exposure to racism, discrimination, gender inequality or harassment; previous exposure to a traumatic event; and individual personal characteristics or personal difficulties.⁴⁴ Employees in particular industries (for example healthcare, social assistance and aged care workers, first responders,⁴⁵ correctional officers and education staff) are at higher risk of injury.⁴⁶ Frequency and intensity of exposure to workplace stress and pressure, and to psychosocial hazards, are also relevant to the risk of injury,⁴⁷ and varying psychosocial hazards 'interact with each other'.⁴⁸ The 'combination of high job demands, low control, and low support increases the likelihood and severity of physical or psychological harm'.⁴⁹

B *Australia's Changing WHS Regulatory Landscape*

Despite existing WHS legislation governing risks to both the psychological and physical health of employees, recent Australian inquiries have found a failure by employers to adequately identify, assess and respond to psychosocial workplace hazards. This has led to more explicit regulation of psychosocial hazards and greater focus on employer responsibility for employee psychological health. The Productivity Commission found in 2020 that psychological health and safety did not 'receive the same focus' in workplaces as 'physical health and safety'.⁵⁰ The Commission recommended that more 'specific reference' including in new WHS regulations was warranted, as well as 'up front' reference to psychological health and safety in the objectives of WHS legislation.⁵¹ Psychological health and safety should, it suggested, be treated in the legislation in a similar way to physical safety.⁵²

⁴³ Safe Work Australia, *Work-Related Psychological Health and Safety: A Systematic Approach to Meeting Your Duties* (National Guidance Material, January 2019) 9–12.

⁴⁴ See Armytage et al (n 21) vol 2, 51–3 (Figures 11.7, 11.8); Safe Work Australia, *Work-Related Psychological Health and Safety* (n 43) 15. See also Productivity Commission (n 11) 299.

⁴⁵ Senate Education and Employment References Committee (n 19).

⁴⁶ Productivity Commission (n 11) 312 (Figure 7.6); Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces* (n 6) 3 (Figures 3, 4). See also *Boland Review Report* (n 22) 32 (discussion of workers who may be at particular risk, including geographically isolated workers, FIFO workers, home-based disability support workers, migrant workers, and women prior to and on return from maternity leave).

⁴⁷ Safe Work Australia, *Work-Related Psychological Health and Safety* (n 43) 16. See also the discussion of the impact of repeated trauma, work intensity and shiftwork on first responders in Senate Education and Employment References Committee (n 19) 8–13 [2.16]–[2.30].

⁴⁸ Safe Work Australia, *Work-Related Psychological Health and Safety* (n 43) 16.

⁴⁹ *Ibid.*

⁵⁰ Productivity Commission (n 11) 300.

⁵¹ *Ibid.* 303.

⁵² *Ibid.* 304 (Action 7.1).

The Commission also supported the development of codes of practice by WHS authorities to assist employers to meet their duty of care.⁵³

The 2018 Boland Review of Australia's model WHS laws⁵⁴ also considered how the model WHS laws⁵⁵ regulated workplace psychological health. The original model WHS legislation defined 'health' to include psychological health such that the duty to ensure 'so far as is reasonably practicable' that workers were not exposed to health risks extended to psychological health.⁵⁶ At that time, however, there were no model WHS regulations or codes specifically focused on psychological health or psychosocial risks, although Safe Work Australia and state and territory WHS regulators had released guidance material.⁵⁷ The Boland Review found that, despite existing WHS obligations which extended to psychological health, there was 'a widespread view that psychological health' was 'neglected in the model WHS Regulations and Code'.⁵⁸ The Review recommended that duty holders needed clearer legislative guidance concerning their legal obligations to manage psychosocial hazards, through new model WHS regulations on identifying and managing risks associated with psychiatric injury.⁵⁹

Since the Boland Review, there has been significant strengthening of WHS regulation across Australia to ensure employers are clear they have an equal responsibility for both the physical and psychological health of their employees, to emphasise the role of workplace psychosocial hazards in workplace psychiatric injury, and to prevent workplace psychiatric injury. New model regulations concerning psychosocial risks were released in April 2022,⁶⁰ and a model code was released in July 2022.⁶¹ Many jurisdictions have since amended their WHS regulations in accordance with the model regulations.⁶² New codes which guide employers about their WHS obligations to identify, assess, eliminate or manage

⁵³ Ibid 307 (Action 7.2). See also 308–31 for a discussion of the need for improvement in workers' compensation arrangements for workplace psychological injury (at 308–30), and a discussion of the role employers could play (at 331–44).

⁵⁴ See *Boland Review Report* (n 22).

⁵⁵ The model WHS legislation has been implemented in local legislation in all Australian jurisdictions except Victoria, with some local variation between jurisdictions: see 'Legislation', *Safe Work Australia* (Web Page, 2023) <<https://www.safeworkaustralia.gov.au/law-and-regulation/legislation>>.

⁵⁶ *Boland Review Report* (n 22) 30.

⁵⁷ Ibid. For an example of guidance released, see Safe Work Australia, *Work-Related Psychological Health and Safety* (n 43).

⁵⁸ *Boland Review Report* (n 22) 33.

⁵⁹ Ibid 35 (Recommendation 2). These recommendations have been accepted by Ministers responsible for WHS: see 'Implementation of WHS Ministers' Agreed Response to the Review of the Model WHS Laws', *Safe Work Australia* (Web Page, 2023) <<https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws>>.

⁶⁰ Safe Work Australia, *Model Work Health and Safety Regulations* (14 April 2022) ch 3 pt 3.2 div 11.

⁶¹ Safe Work Australia, *Managing Psychosocial Hazards at Work: Code of Practice* (n 17).

⁶² *Work Health and Safety Regulations 2011* (Cth) ch 2 pt 3.2 div 11; *Work Health and Safety Regulation 2017* (NSW) pt 3.2 div 11; *Work Health and Safety (National Uniform Legislation) Regulations 2011* (NT) ch 3 pt 3.2 div 11 (from 1 July 2023); *Work, Health and Safety Regulation 2011* (Qld) pt 3.2 div 11; *Work Health and Safety Regulation 2022* (Tas) ch 3 pt 3.2 div 11; *Work Health and Safety (General) Regulations 2022* (WA) ch 3 pt 3.2 div 11.

psychosocial risks have been implemented in many Australian jurisdictions.⁶³ Western Australia has introduced codes relating to both general psychosocial hazards and particular risks such as FIFO work.⁶⁴ Victoria has released draft regulations expected to be introduced in 2023 and is in the process of developing a psychological health compliance code.⁶⁵ Workplace health and safety authorities also provide extensive guidance about how employers can fulfil their WHS legal obligations regarding psychosocial hazards.⁶⁶ Other legislation, including industrial and antidiscrimination legislation, addresses employer responsibility for particular psychosocial hazards such as bullying and sexual harassment.⁶⁷ In December 2022 the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) came into effect. It implements the recommendations of the *Respect@Work* report by providing for a positive duty on employers to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, hostile workplace environments and victimisation.⁶⁸

Employees with psychiatric injury experience significant barriers to claiming workers compensation. There are various restrictions in the Commonwealth, state and territory schemes; an ‘adversarial process’; and difficult return-to-work processes.⁶⁹ Nevertheless, recent reforms demonstrate increased recognition of workplace psychiatric injury. For example, reforms in some jurisdictions have introduced presumptions of liability or simplified compensation pathways where a first responder suffers harm such as post-traumatic stress disorder (‘PTSD’),⁷⁰ and

⁶³ See, eg, SafeWork NSW, *Code of Practice — Managing Psychosocial Hazards at Work* (2022); WorkSafe Qld, *Managing the Risk of Psychosocial Hazards at Work — Code of Practice* (2022). Tasmania and the Northern Territory have adopted the model code.

⁶⁴ See Department of Mines, Industry Regulation and Safety, ‘Mentally Healthy Workplaces Codes of Practice’ (Web Page, 2023) <<https://www.commerce.wa.gov.au/worksafe/mentally-healthy-workplaces-codes-practice>>.

⁶⁵ ‘Occupational Health and Safety Amendment (Psychological Health) Regulations’, *Work Safe Victoria* (Web Page, May 2023) <<https://www.worksafe.vic.gov.au/mental-health>>. See also Work Safe Victoria, *Mental Health Strategy 2021–2024* (2021).

⁶⁶ See, eg, ‘Mentally Healthy Workplaces Toolkit’, *WorkSafe Qld* (Web Page, 2023) <<https://www.worksafe.qld.gov.au/safety-and-prevention/mental-health>>; ‘Psychological Hazards and Work-Related Stress’, *SafeWork SA* (Web Page, 2023) <<https://www.safework.sa.gov.au/workers/health-and-wellbeing/psychological-hazards>>;

‘Work Health and Safety Includes Mental Health’, *NT WorkSafe* (Web Page, 2023) <<https://worksafe.nt.gov.au/safety-and-prevention/workplace-mental-health>>; ‘Supporting Mentally Healthy Workplaces’, *Comcare* (Web Page, 2023) <<https://www.comcare.gov.au/safe-healthy-work/mentally-healthy-workplaces>>; ‘Mental Health’, *WorkSafe ACT* (Web Page, 2023) <<https://www.worksafe.act.gov.au/health-and-safety-portal/safety-topics/mental-health>>; ‘Mentally Healthy Workplaces’, *WorkSafe Tasmania* (Web Page, 2023) <<https://worksafe.tas.gov.au/topics/Health-and-Safety/health-and-wellbeing>>.

⁶⁷ See, eg, *Fair Work Act 2009* (Cth) pt 6-4B (which provides for a worker to apply for an order to stop bullying or sexual harassment), s 340 (which provides protection against adverse action by an employer due to the exercise by the employee of a workplace right), s 545 (which provides for compensation). For a recent case which awarded compensation for psychiatric injury suffered following ‘adverse action’, see *Leggett v Hawkesbury Race Club Ltd* [No 3] (2021) 317 IR 1.

⁶⁸ See, eg, *Sex Discrimination Act 1984* (Cth) s 47C.

⁶⁹ See Productivity Commission (n 11) 312–30. For example, psychological injury caused by ‘reasonable management action’ is typically excluded and higher thresholds to claim such as the need for the work to be a ‘significant contributing factor’ or meet a threshold of impairment may apply.

⁷⁰ See, eg, *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ss 36EA–36ED.

provisional liability to allow the provision of early mental health support to injured employees.⁷¹ A national best practice framework for the management of psychiatric injury compensation claims has been released⁷² and a National Return to Work Strategy 2020–2030 has been developed by Safe Work Australia and endorsed by WHS Ministers to support workers to recover from their psychiatric injuries and return to work.⁷³

III Negligence Liability post *Koehler v Cerebos (Australia) Ltd*

Employers owe their employees a non-delegable duty of care in negligence which includes the provision, maintenance and enforcement of a safe system of work.⁷⁴ After at least *Mt Isa Mines Ltd v Pusey*,⁷⁵ in 1970, it was accepted in Australian law that employees could recover for psychiatric injury where an employer had not taken reasonable steps in response to a foreseeable risk of psychiatric injury.⁷⁶ However, in 2005 in *Koehler*,⁷⁷ the High Court of Australia placed additional constraints on whether and when an employee could recover in negligence for workplace psychiatric injury. Following *Koehler*, injured employees faced increased barriers to recovery in negligence.⁷⁸ Negligence law in Australia from 2005 developed with a focus on the vulnerability of individual employees to psychiatric injury as the predominant factor in foreseeability and causation of injury. Courts inadequately recognised the role of employer-controlled psychosocial hazards. Courts were also heavily influenced by the growing focus in Australian negligence law on the necessity for the principles of negligence law to be coherent with other areas of law, such as contract and legislation.⁷⁹ Despite this focus on ‘coherence’, there was a surprising lack of judicial interest in the development of negligence law principles coherent with WHS obligations.⁸⁰ Courts were also eager to reflect concerns of individualist ‘legal policy’ — such as autonomy, individual dignity and individual responsibility — rather than notions of accident prevention.⁸¹

⁷¹ See, eg, *ibid* ch 4 pt 5A.

⁷² Safe Work Australia, *Taking Action* (n 3).

⁷³ See Safe Work Australia, *National Return to Work Strategy 2020–2030* (2019).

⁷⁴ *Czatyрко v Edith Cowan University* (2005) 214 ALR 349.

⁷⁵ *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

⁷⁶ For discussion of early Australian cases on ‘work stress’ see Peter Handford, ‘Liability for Work Stress: *Koehler* Ten Years On’ (2015) 39(2) *University of Western Australia Law Review* 150, 152–8.

⁷⁷ *Koehler* (n 26). For discussion of the case see Burns, ‘Employers Behaving Badly?’ (n 18).

⁷⁸ See discussion in Handford (n 76).

⁷⁹ See Andrew Fell, ‘The Concept of Coherence in Australian Private Law’ (2018) 41(3) *Melbourne University Law Review* 1160.

⁸⁰ For a discussion of the limitations on a direct private right to damages as result of breach of statutory WHS duties, see Harold Luntz et al, *Luntz and Hamby’s Torts: Cases, Legislation and Commentary* (LexisNexis, 9th ed, 2021) 682–6.

⁸¹ For a critique of the High Court’s shift away from communitarian values and accident prevention in negligence, see *New South Wales v Fahy* (2007) 232 CLR 486, 539–40 [172] (Kirby J).

A Koehler v Cerebos (Australia) Ltd

Koehler involved a part-time employee who suffered a psychiatric injury following excess workload and work intensity. At trial it was held reasonably foreseeable that the excessive workload could increase the risk of psychiatric injury, and the Court found a failure to have a safe system of work in response.⁸² On appeal, it was found not foreseeable to the employer that the employee could suffer a psychiatric injury in the circumstances.⁸³ While *Koehler* was decided on appeal and argued in the High Court on the basis of breach of duty only, the High Court considered that an initial focus on breach in workplace psychiatric injury cases had invited error.⁸⁴ Focusing on the ‘well-established proposition that an employer owes an employee a duty to take all reasonable steps to provide a safe system of work’ and ‘discarding any asserted distinction between psychiatric and physical injury’ was not the correct approach.⁸⁵ The High Court introduced new hurdles to liability including a focus on whether the content of the duty of care extended to psychiatric harm, and the need for foreseeability of psychiatric harm to the individual employee.⁸⁶ The Court also held that the content of the duty of care must take account of ‘fundamental aspects of the relationship between the parties’⁸⁷ and could not 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.⁸⁸

This would require ‘exploration of the contractual position’ against ‘the relevant statutory framework’ to determine whether the performance of the duties was subject to qualification or limitation.⁸⁹ This included consideration of whether the scope of duty extended to requiring modification of the employee’s work.⁹⁰ The High Court did not, however, decide *Koehler* on the basis that the contractual agreement to perform duties was fatal, as that would have required much ‘closer attention to the content of the contractual relationship’ than had been canvassed in the evidence or arguments at trial or appeal.⁹¹

The High Court ultimately refused the appeal on the basis that the Court of Appeal was correct to hold that the injury was not foreseeable.⁹² The agreement to perform duties which caused the injury was held to run counter to an appreciation by the employer that there was a risk to the employee’s health.⁹³ The High Court

⁸² *Koehler v Cerebos (Aust) Ltd* (2002) 30 SR (WA) 258.

⁸³ *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322.

⁸⁴ *Koehler* (n 26) 53 [19] (McHugh, Gummow, Hayne and Heydon JJ).

⁸⁵ *Ibid.*

⁸⁶ *Ibid* 53–5 [21]–[25] (McHugh, Gummow, Hayne and Heydon JJ).

⁸⁷ *Ibid* 53 [19] (McHugh, Gummow, Hayne and Heydon JJ).

⁸⁸ *Ibid* 53 [21] (McHugh, Gummow, Hayne and Heydon JJ).

⁸⁹ *Ibid* 58 [38] (McHugh, Gummow, Hayne and Heydon JJ).

⁹⁰ *Ibid* 53–4 [21]–[22] (McHugh, Gummow, Hayne and Heydon JJ) (eg, through reduction of the employee’s workload, engagement of additional workers, reduction of pay or dismissal of the employee).

⁹¹ *Ibid* 58–9 [40] (McHugh, Gummow, Hayne and Heydon JJ).

⁹² *Ibid* 53 [20] (McHugh, Gummow, Hayne and Heydon JJ). See also at 64 [55] (Callinan J).

⁹³ *Ibid* 56 [28] (McHugh, Gummow, Hayne and Heydon JJ).

acknowledged that this had ‘limited significance’ in *Koehler*’s case; however, in other cases an agreement to perform contractual duties may have ‘greater significance’.⁹⁴ Liability could not arise where the ‘psychiatric injury to an employee’ was ‘brought about by the employee’s performance of the duties originally stipulated in the contract of employment’.⁹⁵ The High Court also held that the employer had no reason to suspect the risk of psychiatric injury,⁹⁶ and it was ‘too large a step’ to recognise ‘that all employees are at risk of psychiatric injury from stress at work’.⁹⁷ The duty of care was ‘engaged if psychiatric injury to the particular employee is reasonably foreseeable’ which requires attention to the ‘nature and extent of the work being done and signs given by the employee concerned’.⁹⁸ In *Koehler*, the High Court held there ‘was no indication (explicit or implicit)’ that the employee was vulnerable to injury; the employee’s complaints about work overload did not indicate that their psychiatric health was at risk; and when they did go on sick leave, both the employee and their doctor ‘thought the illness was physical, not psychiatric’.⁹⁹ *Koehler* did not clarify where, conceptually, the inquiry about the foreseeability of psychiatric injury was relevant as only breach was ultimately in issue. However, it appears that the Court considered foreseeability of psychiatric harm to the particular employee as critical both to breach and to whether the scope of the employer’s duty extended to psychiatric injury as a type of harm.¹⁰⁰

B Restrictive Judicial Approaches post *Koehler v Cerebos* (Australia) Ltd

The *Koehler* decision was critiqued as unduly restrictive.¹⁰¹ It marked a departure from the previous protective approach taken by the High Court to injured employees.¹⁰² The decision showed inadequate appreciation of psychosocial hazards within employer control.¹⁰³ Following *Koehler*, Australian courts treated foreseeability of psychiatric harm to the particular employee as being necessary before the duty of care arose or the scope of duty extended to psychiatric injury.¹⁰⁴ General employer knowledge about risks of psychiatric injury to employees was generally insufficient to ‘engage’ a duty of care in the absence of explicit or implicit signs of danger to the psychiatric health of an individual employee.¹⁰⁵ A common difficulty in post-*Koehler* cases was the struggle by the parties and judiciary to

⁹⁴ Ibid 56 [29] (McHugh, Gummow, Hayne and Heydon JJ).

⁹⁵ Ibid 56 [29]–[31]. McHugh, Gummow, Hayne and Heydon JJ suggested in such cases that ‘overwork’ or ‘excessive work’ have meaning only by appeal to external standards, but the parties have by agreement departed from the standard.

⁹⁶ Ibid 55 [27] (McHugh, Gummow, Hayne and Heydon JJ).

⁹⁷ Ibid 57 [34]. See also at 64–5 [55]–[56] (Callinan J).

⁹⁸ Ibid 57 [35] (McHugh, Gummow, Hayne and Heydon JJ), citing *Hatton* (n 31).

⁹⁹ Ibid 59 [41] (McHugh, Gummow, Hayne and Heydon JJ). See also at 64–5 [54]–[56] (Callinan J).

¹⁰⁰ For later discussion see *Robertson v Queensland* [2021] QCA 92, [114] (Henry J).

¹⁰¹ See, eg, Handford (n 76); Rima Hor, ‘Psychiatric Illness in the Workplace: The Implications of *Koehler v Cerebos*’ (2005) 27(3) *Sydney Law Review* 557; Burns, ‘Employers Behaving Badly?’ (n 18).

¹⁰² Handford (n 76) 163.

¹⁰³ Burns, ‘Employers Behaving Badly?’ (n 18).

¹⁰⁴ See, eg, *Robertson v Queensland* (n 100) [115]–[125] (Henry J).

¹⁰⁵ The requirement for there to be ‘signs’ that an individual employee was at particular risk was inconsistent with the nature of psychiatric illness: see Hor (n 101) 557.

articulate when there were evident implicit or explicit ‘signs’ that an employee was at risk of psychiatric injury.¹⁰⁶ Many cases concerned workplaces where there were pre-existing, known risks of psychiatric injury to all employees due to the nature of the work. Even in these cases, courts applied the *Koehler* principles in determining that a duty of care was not engaged until the individual employee showed signs of injury.¹⁰⁷

Post-*Koehler* a focus on contractual obligations became a ‘pillar of the orthodox Australian approach to work stress cases’.¹⁰⁸ The strong focus in *Koehler* and later cases¹⁰⁹ on the importance of the employment contract in determining and restricting the scope of duty was troubling. There was failure to recognise inequalities of bargaining power and potential employee exploitation; potential incompatibility with WHS legislation; and incompatibility with the approach taken to physical injury.¹¹⁰ The spectre of the defence of voluntary assumption of risk (long abandoned in work injury cases) was raised, simply for agreeing to carry out work duties.¹¹¹

The *Koehler* principles may initially have been considered applicable only to work intensity and overwork cases.¹¹² Most cases of this kind were unsuccessful following *Koehler*.¹¹³ Since *Koehler*, the principles have been applied in all case categories¹¹⁴ including vicarious trauma,¹¹⁵ work with known risks of psychiatric

¹⁰⁶ See, eg, *The Age Company Ltd v YZ* (2019) 60 VR 189, 213 [118], 215 [129], 222 [167]–[171] (Niall JA, T Forrest JA and Emerton J).

¹⁰⁷ See, eg, *The Age Co Ltd v YZ* *ibid* (crime journalist); *Pateras v Victoria* [2017] VSCA 31 (teacher); *Doulis v Victoria* [2014] Aust Torts Reports ¶82-177 (teacher); *Taylor v Haileybury* [2013] VSC 58 (teacher). In other cases, the existence of the duty of care was recognised by the defendant/court due to the traumatic nature of first responder work (eg, police, ambulance, fire services). However, even in those cases many plaintiffs did not succeed based on failure to prove breach or causation: see, eg, *New South Wales v Briggs* (n 27); *James v Queensland* [2018] QSC 188; *Hegarty v Queensland Ambulance Service* [2007] Aust Torts Reports ¶81-919 (‘Hegarty’); *New South Wales v Fahy* (n 81); *Giles v Queensland* [2021] QCA 206. For successful cases see *Sills v New South Wales* (2019) 285 IR 198 (Court of Appeal) (police officer); *S v New South Wales* [2009] NSWCA 164 (undercover police operative).

Handford (n 76) 175.

¹⁰⁹ See, eg, *Shearer v iSelect Pty Ltd* (2021) 312 IR 296, 309 [48] (Victorian Court of Appeal).

¹¹⁰ Carolyn Sappideen, Paul O’Grady and Joellen Riley, Thomson Reuters, *Macken’s Law of Employment* (online at 25 October 2022) [6.540].

¹¹¹ For discussion of the history of the *volenti non fit injuria* defence and its abolition, see *Brisbane Youth Service Inc v Beven* [2018] 2 Qd R 291, 326–7 [134]–[137] (Sofronoff P).

Handford (n 76) 166.

¹¹³ *Ibid* 173–4. Handford noted that 10 years after *Koehler* there had been no known successful Australian case based on injury caused by excessive work. For the rare example of a successful case, see *Roussety v Castricum Brothers Pty Ltd* (2016) 264 IR 237 (Victorian Supreme Court). For recent examples of unsuccessful cases, see *Shearer v iSelect Pty Ltd* (n 109); *Larner v George Weston Foods Ltd* [2014] VSCA 62.

¹¹⁴ Handford (n 76) 166. Handford argued in 2015 that there appeared to be some awareness by courts that ‘not all work stress cases are the same’ with the influence of *Koehler* strongest in overwork cases, and with bullying/harassment and trauma cases (particularly those involving first responders) more likely to be successful: at 176–7.

¹¹⁵ See, eg, *The Age Co Ltd v YZ* (n 106).

injury,¹¹⁶ and bullying/harassment cases.¹¹⁷ The requirements for evident signs that an employee was at risk of psychiatric injury before a duty arose and limitations by employment contracts on scope of duty have been particularly problematic in these categories.¹¹⁸ A proactive employer duty of care owed from the commencement of employment to take preventative steps regarding risks of psychiatric injury (for example by having and enforcing a safe system of work concerning psychosocial hazards) has generally not been recognised.¹¹⁹ Successful negligence cases have typically involved a reactive duty of care arising during the course of employment when plaintiffs have been exposed to egregious behaviour or significant psychosocial hazards explicitly brought to the attention of employers, who then failed to act to prevent further harm.¹²⁰

Following *Koehler*, further barriers emerged. In *Hegarty v Queensland Ambulance Service* (*'Hegarty'*), Keane JA held that the content of any duty of care should not extend to requiring employers to take proactive steps to reach out to employees and suggest psychological assessment and treatment due to considerations of privacy, human dignity and autonomy.¹²¹ This rested on social fact assumptions about employer and employee views on mental health stigma,¹²² potentially litigious responses by employees to employer 'intrusion',¹²³ and potential industrial relations issues.¹²⁴ In addition, a number of state appellate cases, including *Govier v Uniting Church in Australia Property Trust (Q)*, held that an employer's duty of care did not extend to psychiatric injury suffered during workplace investigations or as part of disciplinary processes.¹²⁵ The basis for the rejection of duty in these cases rested on coherency arguments — that is, that such a duty would be incoherent with other areas of law including industrial law and contract.¹²⁶ The

¹¹⁶ See, eg, *Pateras v Victoria* (n 107); *Doulis v Victoria* (n 107); *Taylor v Haileybury* (n 107) (teachers). See also *Brisbane Youth Service Inc v Beven* (n 111) (social worker).

¹¹⁷ See, eg, *Lloyd v Healthscope Operations Pty Ltd* [2021] VSCA 327; *Swan v Monash Law Book Co-operative* (2013) 235 IR 63; *Brown v Maurice Blackburn Cashman* (2013) 45 VR 22.

¹¹⁸ See, eg, *Brisbane Youth Service Inc v Beven* (n 111) 331–2 [159]–[161] (Sofronoff P) (discussion of the difficulties if professional employees engaged in risky work are assumed to contractually accept all risks of that work, as opposed to employers guarding against those risks).

¹¹⁹ There does appear to have been acceptance by employers and by courts of a more general proactive duty of care in first responder cases, where there is a known risk of significant vicarious trauma to all employees. See discussion in *Sappideen, O'Grady and Riley* (n 110) [6.550]. However, as discussed at n 107, some cases in this category have still failed on breach and causation grounds. See also *Wolters v University of the Sunshine Coast* [2014] 1 Qd R 571 where the trial judge's finding of a proactive duty of care owed to female employees (including the plaintiff) as a result of prior aggressive and abusive behaviour by a male manager known to the employer, was not challenged.

¹²⁰ See, eg, *The Age Co Ltd v YZ* (n 106); *Swan v Monash Law Book Co-operative* (n 117); *Sills v New South Wales* (n 107); *Roussety v Castricum Brothers Pty Ltd* (n 113); *Eaton v Tricare (Country) Pty Ltd* [2016] QCA 139.

¹²¹ *Hegarty* (n 107) [44]–[47]. For later application of these principles of 'privacy', 'autonomy' and 'dignity', see *New South Wales v Briggs* (n 27) 497–9 [124]–[131], 519 [225]–[227] (Leeming JA). *Ibid* [45]–[46].

¹²² *Ibid* [46].

¹²³ *Ibid*.

¹²⁴ *Ibid*.

¹²⁵ *Govier v Uniting Church in Australia Property Trust (Q)* [2017] QCA 12 (*'Govier'*), applying *New South Wales v Paige* (2002) 60 NSWLR 371. For discussion of the existing Australian case law see Adriana Orifici, 'Unsystematic and Unsettled: A Map of the Legal Dimensions of Workplace Investigations in Australia' (2019) 42(3) *UNSW Law Journal* 1075, 1080–2.

¹²⁶ *Ibid* [68]–[78].

High Court initially gave special leave to the plaintiff to appeal in *Govier*;¹²⁷ however, it withdrew special leave during the appeal hearing on the basis that the contract of employment had never been introduced into evidence.¹²⁸

IV New Directions in the High Court? *Kozarov v Victoria*

The 2022 case of *Kozarov*¹²⁹ is the most significant case on negligence liability for workplace psychiatric harm since *Koehler*. While the High Court did not overrule *Koehler*, there are promising signs that a less restrictive approach to employer liability for workplace psychiatric injury is emerging. *Kozarov* involved an appeal by a solicitor formerly employed by the Victorian Office of Public Prosecutions ('OPP') in the Specialist Sexual Offences Unit ('SSOU'). She suffered psychiatric injuries including PTSD because of workplace vicarious trauma. During the course of employment from June 2009 to April 2012, she was exposed to highly distressing and traumatic material related to child sexual abuse (including images, videos and audio of rapes, assaults and child pornography), preparation of children for evidence/cross-examination, and suicidal child complainants.¹³⁰ There was extensive evidence that the OPP was aware of the serious risk of psychiatric injury to all SSOU employees from vicarious trauma¹³¹ including a Vicarious Trauma Policy ('VT Policy') published in 2008.¹³²

Key events following *Kozarov's* appointment included her attendance and contributions at a staff meeting; a staff memorandum to management and training workshops where she expressed significant concerns about the impact of the SSOU work on staff including herself;¹³³ her communication with management about her workload;¹³⁴ exposure to traumatic events;¹³⁵ and sick leave. Finally, there was an alleged 'sentinel event' which culminated in distressed emails she sent to her manager following a workplace internal dispute in late August 2011.¹³⁶ The OPP was held liable in negligence for *Kozarov's* injuries at trial.¹³⁷ Jane Dixon J found that the OPP was 'placed on notice of a risk' to its employee's mental health by the end of August 2011, and had failed to take reasonable steps in response to that risk

¹²⁷ Transcript of Proceedings, *Govier v Unitingcare Community* [2017] HCATrans 183.

¹²⁸ Transcript of Proceedings, *Govier v Uniting Church in Australia Property Trust (Q)* [2018] HCATrans 65.

¹²⁹ *Kozarov* (n 28). This was an appeal from *Victoria v Kozarov* (2020) 301 IR 446 ('*Kozarov (VSCA)*') which had allowed an appeal by Victoria against the decision in *Kozarov v Victoria* (2020) 294 IR 1 ('*Kozarov (VSC)*'). For a discussion of the history of the case and the grounds of the High Court appeal see Kylie Burns, 'Liability for Workplace Psychiatric Injury and Vicarious Trauma: *Kozarov v Victoria*' (2021) 43(4) *Sydney Law Review* 575.

¹³⁰ *Kozarov* (n 28) 129–32 [31]–[44] (Gageler and Gleeson JJ); 590 [74]–[78] (Gordon and Steward JJ).

¹³¹ *Ibid* 141–2 [69]–[73] (Gordon and Steward JJ).

¹³² *Kozarov (VSCA)* (n 129) 451 [12]. Management options in response to vicarious trauma outlined in the policy included rotations within OPP, counselling, debriefing, relocation of files, 'time-outs' and other provision of assistance.

¹³³ *Kozarov* (n 28) 142 [75]–[77] (Gordon and Steward JJ).

¹³⁴ *Ibid* 142–3 [78].

¹³⁵ *Ibid* 136 [53] (Gageler and Gleeson JJ).

¹³⁶ *Ibid* 143 [79]–[80] (Gordon and Steward JJ).

¹³⁷ *Kozarov (VSC)* (n 129).

which included offering a rotation to another area of the OPP.¹³⁸ Jane Dixon J was satisfied this breach of duty caused Kozarov's injury, and that, if an offer of rotation had been offered, Kozarov would have accepted that offer and would have avoided severe psychological injury.¹³⁹

The Court of Appeal of Victoria (Beach and Kaye JJ and Macaulay A-JA) agreed the OPP was on notice of risk to Kozarov by the end of August 2011 and had breached its duty of care.¹⁴⁰ However, the Court of Appeal allowed the appeal by the OPP on causation, overturning the trial judge's factual inference that Kozarov would have accepted an offer to rotate to reduce her exposure to trauma.¹⁴¹ Kozarov's grounds of appeal in the High Court were two-fold: that the Court of Appeal erred in rejecting the trial judge's factual inference concerning causation; and that the causation finding did not sufficiently consider the nature and content of Victoria's duty of care which included a duty to maintain and enforce a safe system of work.¹⁴² By notice of contention, the OPP disputed that it was on notice of risk of psychiatric harm to Kozarov by August 2011.¹⁴³ The High Court unanimously upheld the appeal, holding that the OPP had breached its duty of care, causing Kozarov's injuries.¹⁴⁴

A *Duty of Care and 'Evident' Signs*

1 *Are Evident Signs Always Required to Enliven a Duty of Care?*

Given the wide application of the *Koehler* principles by courts, it was unsurprising that in *Kozarov* the *Koehler* principles were applied at the pre-High Court stages. In *Kozarov*, the parties at both trial and appeal¹⁴⁵ and both the trial and appellate judgments proceeded on the assumption that evident signs of psychiatric injury to Kozarov were required to enliven a duty. Neither Kozarov nor the OPP challenged this interpretation of the legal requirements of the existence and content of an employer's duty in the High Court.¹⁴⁶ Rather, there was a factual dispute about when 'evident' signs of the risk of psychiatric injury to Kozarov were present.¹⁴⁷ However, the High Court found that it was not necessary in all cases for evident signs of psychiatric injury to an individual employee to be present. The employer's duty concerning psychiatric injury may arise, as it does for physical injury, from the inception of the employment relationship. Kiefel CJ and Keane J criticised the formulation and presentation of Kozarov's case as 'unduly complicated' and as

¹³⁸ *Kozarov* (n 28) 128 [23] (Gageler and Gleeson JJ). For further discussion of the trial judgment see Burns, 'Liability for Workplace Psychiatric Injury and Vicarious Trauma' (n 129).

¹³⁹ *Kozarov* (n 28) 128 [23] (Gageler and Gleeson JJ).

¹⁴⁰ *Kozarov* (VSCA) (n 129).

¹⁴¹ *Ibid* 478–9 [106]–[110].

¹⁴² *Kozarov* (n 28) 140 [66] (Gordon and Steward JJ). This argument raised the applicability of *McLean v Tedman* (1984) 155 CLR 306, 313.

¹⁴³ *Kozarov* (n 28) 140 [66] (Gordon and Steward JJ).

¹⁴⁴ Gageler and Gleeson JJ gave the lead judgment, with Kiefel CJ and Keane J; Gordon and Steward JJ; and Edelman J agreeing with the proposed orders.

¹⁴⁵ *Kozarov* (n 28) 122–3 [1]–[2] (Kiefel CJ and Keane J).

¹⁴⁶ Burns, 'Liability for Workplace Psychiatric Injury and Vicarious Trauma' (n 129) 580.

¹⁴⁷ *Ibid* 580–1.

misunderstanding the effect of *Koehler*.¹⁴⁸ They distinguished *Koehler* as concerning ‘exigencies of the employee’s work’¹⁴⁹ — something not in issue in *Kozarov*.¹⁵⁰ Kiefel CJ and Keane J held 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 (just as other kinds of work are inherently and obviously dangerous to the physical health of the employee).¹⁵¹

In such a case, including *Kozarov*’s, a proactive duty of care arose from the time of employment to enable ‘work to be performed safely’.¹⁵² Evidence in the case, including the VT Policy, demonstrated the OPP’s awareness of the serious risk to *Kozarov*’s mental health without the necessity for ‘further warning signs’.¹⁵³ Gageler and Gleeson JJ recognised that *Kozarov*’s case had been ‘put at every stage’ based on the failure of the OPP to respond to ‘evident signs’ of her PTSD.¹⁵⁴ This was based upon the plurality’s assumption in *Koehler* that employers were generally entitled to assume in the absence of ‘evident signs’ that the employee considered they were able to do the job.¹⁵⁵ Gageler and Gleeson JJ considered, however, that *Kozarov* had assumed an ‘unnecessary evidential burden’¹⁵⁶ given ‘unchallenged findings by the trial judge’ of the obvious risk of injury from the ‘nature and intensity of SSOU’s work’, including as reflected in the VT Policy.¹⁵⁷ Gageler and Gleeson JJ held that the assumption 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.¹⁵⁸

Gordon and Steward JJ held that the OPP had a ‘duty to take all reasonable steps to provide’ *Kozarov* with a safe system of work.¹⁵⁹ This was not disputed; had been established at trial and not challenged in the Court of Appeal or High Court;¹⁶⁰ and included a duty to ‘establish, maintain and enforce such a system’.¹⁶¹ This duty of care required the OPP to implement a safe system of work from the inception of the employment relationship in June 2009.¹⁶² Aspects of that duty, including a failure to have an adequate OH&S framework and vicarious trauma training, were breached

¹⁴⁸ *Kozarov* (n 28) 122–3 [1]–[2], 124 [6], 125–6 [11].

¹⁴⁹ ‘Exigencies’ refers to the ‘demands or difficulties’ of a job: see ‘Definition of “Exigencies”’, *Collins English Dictionary* (Web Page, 2023) <<https://www.collinsdictionary.com/dictionary/english/exigencies>>.

¹⁵⁰ *Kozarov* (n 28) 123 [2]. This was not strictly correct as the trial judge had made findings of breach of contract due to overwork and work intensity. These were held to be ‘highly relevant to the negligence claim’: see *Kozarov (VSC)* (n 129) 168 [760]–[767].

¹⁵¹ *Kozarov* (n 28) 124 [6].

¹⁵² *Ibid.*

¹⁵³ *Ibid* 124 [7] (Kiefel CJ and Keane J).

¹⁵⁴ *Ibid* 128–9 [26].

¹⁵⁵ *Ibid* citing *Koehler* (n 26) 57–8 [36].

¹⁵⁶ *Kozarov* (n 28) 129 [29].

¹⁵⁷ *Ibid* 129 [27].

¹⁵⁸ *Ibid* 129 [28].

¹⁵⁹ *Ibid* 144 [82].

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* 144 [83].

¹⁶² *Ibid* 145 [87]–[88] (Gordon and Steward JJ).

throughout Kozarov's employment.¹⁶³ However, it was not until late August 2011 following the distressed emails that there was a failure to intervene by making a welfare inquiry and offering occupational screening that ultimately led to injury.¹⁶⁴ Edelman J held that employers have a duty of care imposed by law 'to ensure the "[p]rotection of mental integrity from the unreasonable infliction of serious harm"¹⁶⁵ which is 'no different from the employer's duty to protect an employee's physical integrity from unreasonable infliction of harm'.¹⁶⁶ This 'imposed duty' is only 'engaged' when there 'is a reasonably foreseeable risk of psychiatric injury to the employee of the general kind that occurred'.¹⁶⁷ Edelman J noted (citing *Koehler*) that the assessment of reasonable foreseeability depends on the nature and extent of the work and 'signs given by the employee concerned'.¹⁶⁸ However, he did not treat *Koehler* as requiring that both elements be present in all cases, holding that the duty arose in Kozarov's case as a consequence of the reasonably foreseeable risk of injury to each and every employee of the SSOU (including Kozarov) from the 'very nature and extent of the work of the SSOU'.¹⁶⁹

2 Were There Evident Signs of Psychiatric Injury?

The majority of the High Court held that, although evident signs were not required to enliven a duty, there were such signs of injury to Kozarov by the end of August 2011. Gageler and Gleeson JJ¹⁷⁰ held that the OPP had failed to 'establish error or injustice of any kind' either by the trial judge or Court of Appeal to warrant disturbing the findings of fact that there were evident signs of psychiatric injury present by the end of August 2011.¹⁷¹ The 'evident signs ... signified more than merely the inevitable and universal experience of vicarious trauma' in the SSOU workplace.¹⁷² Gordon and Steward JJ, treating the issue as one of breach, also held that the trial judge and Court of Appeal had correctly found the OPP was on notice of risk of harm to Kozarov by no later than 29 August 2011.¹⁷³ This was the result of cumulative events viewed against the background of the 'inherently difficult nature of the work'.¹⁷⁴ Edelman J also treated the issue of whether there had been 'evident signs' of injury as a breach issue.¹⁷⁵ He was satisfied that by the end of August 2011 the foreseeable risks of causing or exacerbating psychiatric injury were so great that precautions should have included a welfare enquiry and, potentially, compulsory rotation.¹⁷⁶

¹⁶³ Ibid 145 [88].

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 148–9 [103] quoting *Tame v New South Wales* (2002) 211 CLR 317, 379 [185].

¹⁶⁶ Ibid 148–9 [103].

¹⁶⁷ Ibid 149 [104].

¹⁶⁸ Ibid citing *Koehler* (n 26) 57 [35].

¹⁶⁹ *Kozarov* (n 28) 150 [107].

¹⁷⁰ Gageler and Gleeson JJ considered the issue on the basis that the case was to be determined on the issues 'joined between the parties': ibid 129 [29] citing *Coulton v Holcombe* (1986) 162 CLR 1, 7–8.

¹⁷¹ Ibid 134 [49].

¹⁷² Ibid 136 [53] (Gageler and Gleeson JJ).

¹⁷³ Ibid 140 [67], 143 [80].

¹⁷⁴ Ibid 143 [80] (Gordon and Steward JJ).

¹⁷⁵ Ibid 149 [105], 150 [108].

¹⁷⁶ Ibid 151 [110]–[111].

Kiefel CJ and Keane J held that, given a proactive duty of care arose from the time of employment and was breached from the time of employment, there was no need for Kozarov's case to be formulated on the precise time a later sentinel event or evident sign arose in respect of either breach or causation.¹⁷⁷ Although not required in *Kozarov* to satisfy the requirements of duty, their Honours would have reached a different view to the Court of Appeal (and the other High Court Justices) on whether the evidence accepted at trial gave rise to any further notice of risk to Kozarov's health than the VT Policy.¹⁷⁸ They held that complaints of overwork or excessive workload are not generally to be taken by an employer as an indication of risk to psychiatric health.¹⁷⁹ Angry, righteous emails in the context of employment dealings may also not be indicative of a risk to psychiatric health.¹⁸⁰

B Breach of Duty and Enforcement of Safe Systems of Work

The High Court held that the duty of care owed to Kozarov was breached from the inception of employment.¹⁸¹ Employers may have to take early, proactive actions to avoid breaching their duty of care, such as having an appropriate OH&S framework which responds to the risk of psychiatric injury. In addition, an employer is required to maintain and enforce such a system. Kiefel CJ and Keane J held that 'none of the protective measures identified in the VT Policy' nor 'any other reasonably available preventative or protective measures were implemented' within the SSOU.¹⁸² Gordon and Steward JJ also found that the trial judge's unchallenged findings were that the OPP had breached 'each aspect of the duty of care' from the start of employment including a 'woefully inadequate' OH&S framework, inadequate training of SSOU staff and management about vicarious trauma and PTSD, failure to offer a welfare enquiry and occupational screening to Kozarov, and no system to respond to the outcome of screening.¹⁸³ However, on the basis of the trial judge's findings,¹⁸⁴ while aspects of the duty were breached prior to August 2011 (such as the OH&S framework and training) it was not until the failure to offer a welfare enquiry and offer occupational screening in late August 2011 that the breach 'could be said to have caused' Kozarov's injury.¹⁸⁵ Gordon and Steward JJ found, accepting Kozarov's submissions on appeal, that the duty of care extended not merely to establishing a safe system of work but also to enforcing it, and this would include using the employer's power to 'prescribe, warn, command and enforce obedience'

¹⁷⁷ Ibid 125–6 [10]–[11].

¹⁷⁸ Ibid 126–7 [12]–[16].

¹⁷⁹ Ibid 126–7 [14]–[17].

¹⁸⁰ Ibid 127 [18]. Cf Gageler and Gleeson JJ at 136 [54].

¹⁸¹ Gageler and Gleeson JJ's judgment focused only on the findings of fact concerning evident signs of injury and the issue of rotation: see *ibid* 129 [29].

¹⁸² Ibid 125 [8]–[10], 127 [19]. See also Gageler and Gleeson JJ who referred to a duty to maintain a safe system of work due to nature and intensity of the SSOU work: at 129 [27]–[28].

¹⁸³ Ibid 145 [86].

¹⁸⁴ Ibid 145 [87]. Gordon and Steward JJ also noted the acknowledgment by senior counsel for Victoria during oral argument that there was a requirement to implement a safe system of work from the beginning of employment.

¹⁸⁵ Ibid 145 [88]. Gordon and Steward JJ noted that both parties (subject to the notice of contention) were content to argue this was the critical 'breach' date.

by the employee.¹⁸⁶ They noted that senior counsel for Victoria conceded during oral argument that the ‘duty required Victoria to do “almost everything” it could “short of forcing rotation” to protect Ms Kozarov from the risk of psychiatric injury’.¹⁸⁷

Edelman J also held that the nature of SSOU work required ‘immediate precautions concerning every employee in the unit’.¹⁸⁸ Unlike the trial judge and Gordon and Steward JJ, Edelman J suggested that it was possible these early measures might ‘in combination ... have prevented’ Kozarov’s psychiatric injury.¹⁸⁹ As more evident signs of serious psychiatric injury were present, the OPP should have put in place increased precautions and response including a welfare enquiry.¹⁹⁰ Edelman J significantly found that it may have been that by the end of August 2011 reasonable precautions would have included ‘compulsory rotation’¹⁹¹ and that an employer cannot comply with their duty to provide a safe place of work by ‘acquiescing in the refusal of an employee to be rotated’ from a position which presents a ‘high risk of serious physical injury’, noting further that ‘[p]sychiatric injury is no different.’¹⁹²

C Causation and Factual Inferences

The trial judge and the Court of Appeal assumed that, in order to prove causation, Kozarov was required to prove the counterfactual that if offered rotation to another area of the OPP in August 2011, she would have accepted rotation.¹⁹³ The trial judge found this burden to be discharged. However, the Court of Appeal concluded that Kozarov had not proved she would have accepted rotation.¹⁹⁴ The Court relied on Kozarov’s statements in emails to her manager after the August 2011 dispute about her dedication to her work and her decision to apply for promotion.¹⁹⁵ The High Court held that Kozarov had demonstrated she would have accepted rotation if offered, and the Court of Appeal was in error.

¹⁸⁶ Ibid 144 [83] citing *McLean v Tedman* (n 142) which had been argued by Kozarov in the appellant’s submissions in the High Court: see Zagi Kozarov, ‘Appellant’s Submissions’, Submission in *Kozarov v Victoria*, Case No M36/2021, 9 July 2021 [43]–[48].

¹⁸⁷ *Kozarov* (n 28) 144 [83] quoting senior counsel for Victoria. For discussion of the requirement for an employer to enforce a safe system of work which extends to prevention of bullying and harassment even in ‘robust’ workplaces, see *Stevens v DP World Melbourne Ltd* [2022] VSCA 285 [62].

¹⁸⁸ Ibid 150–1 [109]. This included the earlier measures referred to by Gordon and Steward JJ in their judgment including an adequate OH&S framework and more intensive training for managers and staff: at 144 [82].

¹⁸⁹ Ibid 150–1 [109]. Edelman J noted that this was not the way Kozarov’s case was run on either a ‘primary or alternative’ basis but rather focused on later, greater precautions necessary by late August 2011. However, it appears Kozarov did argue at trial that precautions, culminating in rotation, should have occurred earlier: see *Kozarov (VSC)* (n 129) 161 [727]–[728].

¹⁹⁰ *Kozarov* (n 28) 151 [110] (Edelman J).

¹⁹¹ Ibid 151 [111]. Ultimately, Edelman J found (at 151 [112]) it was unnecessary to decide this issue due to his view that Kozarov would have agreed to rotation.

¹⁹² Ibid 151 [111].

¹⁹³ Ibid 137 [57] (Gordon and Steward JJ). Gordon and Steward JJ noted that the Court of Appeal ‘observed that there was no suggestion that’ Kozarov could have been compelled to accept rotation. For a different view, see Burns, ‘Liability for Workplace Psychiatric Injury and Vicarious Trauma’ (n 129) 586.

¹⁹⁴ Ibid 137 [58].

¹⁹⁵ Ibid 137–8 [58].

Kiefel CJ and Keane J found that, had Kozarov's case been properly formulated concerning the duty of care and breach arising from the commencement of employment, there would have been no need to consider the counterfactual causation issue of whether she would have been willing to accept rotation after the end of August 2011.¹⁹⁶ Gageler and Gleeson JJ found that Kozarov's cooperative conduct seeking rotation in February 2012 when she became aware of her PTSD, and the expert evidence accepted at trial that the majority of reasonable people would heed medical advice about the means to ameliorate their illness, supported a finding of causation.¹⁹⁷

Gordon and Steward JJ found that a 'real review of the evidence' supported a finding that Kozarov would have cooperated to reduce her exposure to trauma.¹⁹⁸ There was an undisputed finding that she would have accepted an offer for welfare enquiry and screening, which also supported a finding that she would have agreed to a reduction of exposure to trauma.¹⁹⁹ In the counterfactual where the OPP had not breached its duty to Kozarov, she would have received training on vicarious trauma, been diagnosed earlier with PTSD, and been offered earlier methods of reducing her trauma exposure.²⁰⁰ Given these things did not occur, 'very little (if any) weight should be given' to her application for promotion or her statements in the email following the dispute with her manager.²⁰¹ No reason had been given by the OPP or the Court of Appeal as to why Kozarov's response would have been different to the 'response of the very significant majority of people'.²⁰² Gordon and Steward JJ found that the contract of employment was no barrier to causation, given the trial judge's finding that Kozarov would have cooperated, and no good reasons were given by the OPP for why she could not have been rotated.²⁰³ There was therefore no necessity to consider whether she could have been compelled to rotate.²⁰⁴

Edelman J agreed with Gageler and Gleeson JJ and Gordon and Steward JJ, that the better view of counterfactual causation on the evidence was that Kozarov would have accepted an offer to have screening and would have agreed to rotation.²⁰⁵ As indicated above, Edelman J suggested the risk of psychiatric injury was so great it may be that reasonable precautions would have included compulsory rotation.²⁰⁶

¹⁹⁶ Ibid 125 [10].

¹⁹⁷ Ibid 138 [59]. Gageler and Gleeson JJ noted (at 139 [61]–[62]) there was a body of material tending against the 'rotation finding', however this should be given little weight.

¹⁹⁸ Ibid 146 [92]–[93].

¹⁹⁹ Ibid 146 [94].

²⁰⁰ Ibid 147 [95] (Gordon and Steward JJ).

²⁰¹ Ibid.

²⁰² Ibid 147 [96].

²⁰³ Ibid 147 [97].

²⁰⁴ Ibid.

²⁰⁵ Ibid 151 [112].

²⁰⁶ Ibid 151 [111].

V New Coherence and Unresolved Tensions in Liability for Workplace Psychiatric Injury

Andrew Fell has argued in the broader context of Australian private law that while the High Court has stressed the fundamental importance of the concept of coherence, it has neither defined coherence nor explained why it is important.²⁰⁷ This is particularly salient in workplace psychiatric injury negligence cases. Despite some clarification of the law in *Kozarov*, several matters remain unresolved, particularly as the High Court did not explicitly overrule *Koehler*. These include whether evident signs of psychiatric injury from an employee will ever be required to ‘engage’ a duty of care or whether the employer’s duty of care concerning physical and psychiatric injury is now merged; the relevance of coherence with contract and legislative obligations in determining the content or scope of the duty; whether cases concerning excessive work or work overload should be distinguished from cases like *Kozarov* involving inherent risk of vicarious trauma to all employees; the role of legal policy concerns such as privacy and autonomy; and whether concerns of coherence prevent a duty of care in cases where psychiatric injury is suffered as a result of performance management and workplace disciplinary investigations.

A Is There a Continuing Role for the ‘Evident Signs’ Test? Has the Employment Duty for Physical and Psychiatric Injury Merged?

Following *Kozarov*, it is clear that the test of whether an employer’s duty of care extends to psychiatric injury is one of ‘reasonable foreseeability’; however, this test can be satisfied in numerous ways.²⁰⁸ Signs of psychiatric injury to a particular employee are not required *in all cases*. Where there is evidence that an employer has actual knowledge of the risk of psychiatric injury to each and every employee, there will be no need for an employee to also show signs of risk of injury to themselves individually at the duty stage.²⁰⁹ The nature and intensity of the work will also be a key factor. Where there is a known risk of vicarious trauma to all employees due to the inherently traumatic nature of the work, a proactive and reactive duty of care may arise from the inception of the employment relationship.²¹⁰

²⁰⁷ Fell (n 79) 1162.

²⁰⁸ See, eg, *Bersee v Victoria* [2022] VSCA 231 [87]–[106]. Cf *Potter v Gympie Regional Council* [2022] QCA 255 [37]–[49] where the Queensland Court of Appeal upheld the trial judge’s application of the *Koehler* test requiring apparent signs of illness from the employee as the basis for reasonable foreseeability. The judgment does not cite or consider the implications of the more recent High Court decision in *Kozarov* (n 28).

²⁰⁹ See, eg, *Stevens v DP World Melbourne Ltd* (n 187) [58]–[59].

²¹⁰ See, eg, *Bell v Nexus Primary Health* [2022] VSC 605 (where a domestic violence service was held to have a proactive and reactive duty of care to a domestic violence worker to have, and enforce, a safe system of work); *New South Wales v Skinner* [2022] NSWCA 9 (where a proactive and reactive duty owed to a police officer was held to have been breached by failure to refer for appropriate psychiatric assessment).

Where there is not an immediately obvious risk of psychiatric injury to all or a particular employee, courts will need to focus on the evidence to determine reasonable foreseeability. As discussed above, in *Koehler* the High Court controversially held in 2005 that employers could not be expected to recognise, as a matter of general knowledge, the risk of psychiatric injury to all employees from stress at work.²¹¹ The High Court did nevertheless leave open the possibility that there may be other matters, beyond general knowledge, that might make the risk of psychiatric injury foreseeable.²¹² The High Court in *Kozarov* did not have to consider whether by 2022 the risks of psychiatric injury to employees should have been known by the OPP as a matter of general knowledge, as there was clear evidence of actual employer knowledge of the risks of vicarious trauma and the nature of the work was inherently dangerous. However, as discussed in Part II, all employers are now required by WHS legislation to assess psychosocial risks and hazards in the workplace and to have and implement a WHS framework to respond to those risks. Psychosocial hazards are present in all workplaces in varying degrees. As a matter of coherence in the law, it should be increasingly difficult for an employer to maintain that it could not reasonably foresee the potential risks of psychiatric injury to employees. This should leave little ambit for a requirement that an employee additionally show explicit or implicit signs of risk of injury to them individually to trigger a duty of care. The existence of explicit or implicit signs of injury to an employee will still be relevant at the time of determining breach and the reasonableness of precautions. For example, it may only be reasonable to require an employer to take substantial precautions, such as employee screening and intervention in an employee's work, when the employee is exhibiting signs of distress or the work duties are inherently traumatic.

One of the unfortunate legacies of *Koehler* was to effectively require no preventative steps in response to general risks of psychiatric injury to all employees as a result of psychosocial hazards. An employer's duty was only triggered when an injury had almost certainly been suffered by an individual employee. Any action required of an employer was likely too late and may not, as a matter of causation, have prevented the injury. A number of the judges in *Kozarov* suggested that the employer's duty to provide and enforce a safe system of work applies equally to physical and psychiatric injury. The foreseeable risk of psychiatric injury (as opposed to physical injury) should not necessarily be treated differently based on some higher test or standard. It is not clear post *Kozarov* that there should be a need to consider the additional requirement of whether the scope or content of the employer's duty extends to psychiatric injury. This moves negligence law in Australia closer to the point where a proactive and reactive duty of care owed by

²¹¹ *Koehler* (n 26) 57 [34].

²¹² *Ibid* 54 [24]. See, however, *Hayes v Queensland* [2017] 1 Qd R 337, 348 [12] (McMurdo P) ('The reasonable employer in the position of the respondent in 2009, although not expected to have medical expertise, could reasonably be expected to have known that prolonged workplace stress could detrimentally affect the physical and mental health of employees performing work like the appellants').

employers concerning physical and psychiatric injury become fused.²¹³ A proactive and reactive negligence duty of care owed by an employer to all employees from inception of employment would also be coherent with the WHS legislative obligations discussed in Part II.

B Coherence and Employment Contracts

The role of employment contracts in determining the content or scope of the duty of care was not directly at issue in *Kozarov*. An alternative contractual claim had been considered at trial and Jane Dixon J had found contractual breaches including unreasonable workload and failure to provide a safe workplace.²¹⁴ The employment contract had extensive provisions concerning WHS matters including reasonable workload. Unlike in *Koehler*, the contract was held to strengthen Kozarov's case and was 'highly relevant' to the negligence claim.²¹⁵ As part of the causation argument in the Court of Appeal and High Court, the OPP argued that the contract of employment prohibited rotation and that Kozarov's contract of employment required her to be employed only in the SSOU and not in other parts of the OPP.²¹⁶ As discussed above, the Court of Appeal also held, without any significant exploration of the contract of employment, that the contract prohibited rotation. The High Court accepted neither the OPP's submissions nor the Court of Appeal findings.²¹⁷

In *Koehler*, the High Court left open the question of the interaction between contract and negligence for future cases, suggesting this would require 'much closer attention' than was necessary in *Koehler*.²¹⁸ Nevertheless, *Koehler* strongly suggested that employment contracts could constrain the existence or scope of an employer's duty of care, and impact on determinations of whether psychiatric injury was foreseeable. Later cases have interpreted *Koehler* as indicating the primary and fundamental role of contract in constraining the limits of any duty of care.²¹⁹ The High Court in *Kozarov* provides some clues that in the future courts may be less likely to hold that an employment contract restrains an employer's duty of care. It is clear from *Kozarov* that an employee's contractual agreement to carry out employment duties in what was an inherently 'dangerous' occupation, did not negate a duty of care to provide and enforce a safe system of work concerning mental health.²²⁰ *Kozarov* suggests that an employment contract can reinforce or even broaden the scope of a duty of care. Edelman J suggested, by way of obiter, that the duty of care of employers can arise in two separate categories — 'those that arise by

²¹³ Cf *Bersee v Victoria* (n 208) [91]–[105] where the Victorian Court of Appeal rejected the applicant's submission that a duty of care in relation to psychiatric injury from overwork was owed from the start of employment as a consequence solely of the employment relationship.

²¹⁴ *Kozarov (VSC)* (n 129) 169 [765].

²¹⁵ *Ibid* 169 [767].

²¹⁶ Victoria, 'Submissions of the Respondent', Submission in *Kozarov v Victoria*, Case No M36/2021, 6 August 2021, [47]–[49] ('Victoria's Submissions').

²¹⁷ *Kozarov* (n 28) 147 [97] (Gordon and Steward JJ).

²¹⁸ *Koehler* (n 26) 58 [40] (McHugh, Gummow, Hayne and Heydon JJ).

²¹⁹ See, eg, *Shearer v iSelect Services Pty Ltd* (n 109) [48].

²²⁰ See also *Matinca v Coalroc [No 5]* [2022] NSWSC 844 [107] (Campbell J) (noting that while employees have rights to bargain away their individual freedoms, these rights are not 'absolute' and are not a 'bar' to their employer exercising its power to 'prescribe, warn, command and enforce obedience to its commands' concerning safety).

“a voluntary undertaking independent of contract” based upon “an assumption of responsibility” and those ‘imposed, independently of any undertaking, by a statutory or common law rule’.²²¹ He considered that the duty in *Kozarov* concerned the second category, imposed duty.²²² It was only in cases concerning the first category of duty that he considered a full exploration of the contractual position was required to determine the existence and content of the duty, given ‘affinity between tort and contract here is strong’.²²³ It is not clear what kind of workplace cases would fall into the first category of duty assumed through voluntary undertaking,²²⁴ with most (if not all) employer duties being imposed duties.

Neither *Koehler* nor *Kozarov* addressed some fundamental questions about coherence and the relevance of employment contracts in determining the existence and scope of a duty of care. Great care should be taken in assuming that terms of a private employment contract can override or limit an employer’s duty of care in negligence concerning psychiatric injury as a matter of coherence. Private employment contracts in Australia do not fully govern the workplace obligations and rights of employers and employees. Provisions of employment contracts may be unenforceable or void where they conflict with an employer’s legislative obligations. Australian employment contracts are impacted by a complex array of legislation and regulation including industrial legislation;²²⁵ employment awards and enterprise agreements; National Employment Standards, which mandate minimum employment standards which cannot be displaced;²²⁶ WHS legislation, regulations and codes;²²⁷ public service administration legislation governing public sector employment;²²⁸ workers compensation legislation; and discrimination and human rights legislation.²²⁹ This legislative framework may affect many aspects of an employment contract including reasonable hours of work,²³⁰ workplace safety conditions, and how an employer can deal with an injured or disabled employee including when termination of employment can lawfully occur.²³¹ It is highly unlikely that an employee’s agreement, in an employment contract, to effectively waive the employer’s legislative WHS obligation to provide a safe working

²²¹ *Kozarov* (n 28) 148 [100] quoting *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 528–9.

²²² *Ibid* 148 [102].

²²³ *Ibid* 148 [101].

²²⁴ *Ibid* (Edelman J noting that such a duty may be ‘more or less extensive’ than the duty of care imposed by law).

²²⁵ See, eg, *Fair Work Act 2009* (Cth).

²²⁶ *Fair Work Act 2009* (Cth) pt 2-2.

²²⁷ See, eg, the instruments listed at nn 60–64.

²²⁸ For example, the Victorian Public Service Agreement 2006 (2009 Extended and Varied Version) and the *Public Service Administration Act 2004* (Vic) formed part of *Kozarov*’s contract of employment: see *Kozarov* (VSC) (n 129) 166 [754].

²²⁹ See, eg, *Sex Discrimination Act 1984* (Cth) s 47C.

²³⁰ *Fair Work Act 2009* (Cth) s 62 (which provides an employee cannot be required to work greater than 38 hours a week unless the additional hours are reasonable).

²³¹ See, eg, *Fair Work Act 2009* (Cth) ss 351, 352; *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ch 4 pt 6.

environment would be enforceable, due to its lack of coherence with WHS legislation.²³²

C *Excessive Hours and Overwork*

As discussed in Part III, since *Koehler* claims by plaintiffs injured due to excessive working hours or work intensity have generally been unsuccessful. Australian courts applying the *Koehler* principles have not recognised a proactive duty of employers to provide reasonable workloads or reasonable workhours. This has typically been justified on the bases that employees have autonomy to contract to work excessive hours or incur unreasonable workloads; that excessive hours of work or work intensity are better dealt with as an industrial issue or by industrial legislation; and that it is not appropriate, or is too difficult, for courts to determine reasonable standards of work hours. In addition, courts have held that psychiatric injury as a result of excessive work is not generally foreseeable by an employer in the absence of very specific complaints or overwhelming signs or a high risk of psychiatric injury.²³³ Despite this, at trial in *Kozarov*, Jane Dixon J found on the evidence that the OPP had breached the employment contract concerning excessive hours and the intense workload allocated to Ms Kozarov.²³⁴ This overwork was held ‘highly relevant to the negligence claim’ as it increased the risk of harm to her.²³⁵ The trial judge’s findings concerning overwork were not appealed in the Court of Appeal or the High Court.

The High Court should, in an appropriate case, revisit whether the *Koehler* principles requiring signs of injury before a duty of care is engaged continue to apply in cases of overwork or excessive work. *Koehler* was underpinned by outdated assumptions about employer knowledge of the consequences of overwork on employee psychological health. The High Court failed to recognise excessive work as a psychosocial hazard which creates a risk of injury. In *Kozarov*, the High Court seems to have preserved the *Koehler* principles as applicable to pure excessive work or overwork cases for the time being.²³⁶ Kiefel and Keane JJ took a particularly

²³² WHS model legislation has provisions which preclude an employer’s obligation to contract out of or delegate their WHS duties: see, eg, *Work Health and Safety Act 2011* (Qld) s 272. Whether at common law there is even a possibility that an employee can waive their rights to a safe place of work appears unresolved: see *Kozarov* (n 28) 151 [111] (Edelman J). Such a common law right to waive would likely be incoherent with WHS and other legislation which is protective of employee’s safety: see also *Brisbane Youth Service Inc v Beven* (n 111) [168] (Sofronoff J).

²³³ See, eg, *Ackers v Cairns Regional Council* (2021) 311 IR 378, 381 [5] (Henry J) (*‘Ackers’*) (which held that very long ‘extremely demanding’ hours were not alone sufficient to make a psychiatric injury foreseeable, although when combined with ‘signs’ of psychological distress by an employee they may be sufficient).

²³⁴ *Kozarov (VSC)* (n 129) 168–9 [761]–[767]. See also at 126 [563]–[564], 128 [573] (where the unacceptably high workload pressure was held to be a compounding factor to the danger to the plaintiff when combined with trauma exposure).

²³⁵ *Ibid* 169 [767].

²³⁶ For recent cases which applied *Koehler* to this type of case, see *Shearer v iSelect Services Pty Ltd* (n 109); *Ackers* (n 233). For a recent overwork case where the Victorian Court of Appeal attempted to reconcile both *Koehler* and *Kozarov* as ‘opposite ends of a single spectrum’, see *Bersee v Victoria* (n 208) [88]–[89]. The Court held that evident signs of illness or distress are not a precondition of reasonable foreseeability but may still be relevant to determining reasonable foreseeability. In the circumstances, the Court held a duty was owed, but was not breached.

stringent approach in *Kozarov* rejecting the contention that employee complaints of overwork ‘in an ordinary workplace’ should be treated as an indication of risk to the psychiatric health of the employee or that they should be responded to by an employer as a WHS matter.²³⁷ Such matters, they suggested, should usually be treated as an industrial matter²³⁸ rather than a risk of psychiatric harm as ‘the employer may decide that such a prospect might be best avoided by terminating’ the employee’s employment.²³⁹

The principle that negligence law should be coherent with legislative obligations suggests a different approach. As discussed in Part II, there are legislative WHS obligations which require employers to identify, manage and ameliorate psychosocial hazards which include excessive work hours and excessive work intensity. Additionally, the National Employment Standards,²⁴⁰ which apply to most Australian workers and cannot be excluded, set a notional maximum number of 38 work hours per week with only reasonable hours above that maximum lawful.²⁴¹ The reasonableness of excess hours is judged by a range of matters including health risks, family obligations, whether the extra hours are remunerated, the overall salary and the seniority of the role.²⁴² The focus in the *Koehler* and *Kozarov* judgments on the freedom of parties to contract for excessive workload is outdated to the extent that contracts requiring unreasonable excessive work would be unlawful under current industrial legislation. As discussed above, some of the judgments in *Koehler* and *Kozarov* rejected a duty which extended to excessive work on the basis that employers may respond to employee complaints by sacking them or engaging in discrimination or other adverse actions.²⁴³ These social fact policy arguments should be rejected.²⁴⁴ Employers who acted in that manner in response to employee complaints would likely be engaging in unlawful conduct. Industrial legislation prohibits taking adverse action against an employee for raising matters such as breach of minimum work standards including excess work hours.²⁴⁵ In addition, there are restrictions on termination of employees suffering work injury.²⁴⁶ Remedies for that unlawful conduct are available under the relevant legislation. The possibility of unlawful employer conduct should not be treated as a policy reason against imposing a duty of care. The better approach would be to assume that the employer’s duty of care to provide a safe system of work extends to psychosocial hazards including excessive work hours, and to determine at the breach and

²³⁷ *Kozarov* (n 28) 126–7 [13]–[16].

²³⁸ *Ibid* 126 [14].

²³⁹ *Ibid* 127 [16].

²⁴⁰ The National Employment Standards post-date the decision in *Koehler* (n 26).

²⁴¹ *Fair Work Act 2009* (Cth) s 62.

²⁴² *Ibid*.

²⁴³ *Kozarov* (VSC) (n 129) 169 [767]; *Koehler* (n 26) 53–4 [21] (McHugh, Gummow, Hayne and Heydon JJ).

²⁴⁴ For discussion of risks in judicial use of commonsense social facts, see Kylie Burns, ‘It’s Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases’ (2013) 21(2) *Torts Law Journal* 73; Kylie Burns, ‘Judges, “Common Sense” and Judicial Cognition’ (2016) 25(3) *Griffith Law Review* 319.

²⁴⁵ *Fair Work Act 2009* (Cth) s 340.

²⁴⁶ See, eg, *Fair Work Act 2009* (Cth) ss 351, 352; *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ch 4 pt 6.

causation stage whether (on the facts) the employer has acted unreasonably concerning expected work hours and work intensity.

D *Role of Employee Privacy and Autonomy*

As discussed in Part III, Keane JA's judgment in *Hegarty v Queensland Ambulance Service*²⁴⁷ suggested that a scope of duty which extended to requiring employers to follow up and intervene in response to possible signs of employee deterioration may impinge on the dignity of individuals and intrude on their private life, autonomy and privacy. In *Kozarov*, the OPP argued on appeal in the High Court that it was impermissible to formulate a 'duty to intrude into an employee's mental well-being'.²⁴⁸ The trial judge in *Kozarov* found, however, that employers were not immune from making proper inquiries about staff welfare where it was warranted, particularly in high-risk environments; that a system of work which offered welfare enquiries would uphold, rather than detract from, employee dignity; and that such a system would be consistent with the VT Policy and the OPP's obligation as a public sector employer.²⁴⁹

The relevance of autonomy and privacy in determining the scope of an employer's duty of care remained unresolved in *Kozarov*, as it was ultimately unnecessary for the High Court to determine this given the findings on duty and breach.²⁵⁰ Kiefel CJ and Keane J, however, suggested that employees who seek 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'.²⁵¹ They held that *Kozarov*'s managers, for reasons of 'personal autonomy and privacy', were not duty bound to seek further information from her about her mental health, by reason only of her participation in 'collective complaints by the staff of the SSOU about being overworked and stressed as a result'.²⁵² Gageler and Gleeson JJ and Gordon and Steward JJ appeared to take a different view, finding that part of the context and complexion of whether the OPP was on notice of a risk of harm to Ms *Kozarov* 'included 'the staff memorandum, signed by the appellant' which 'was a plain indication that she might be suffering one or more of the adverse symptoms of vicarious trauma identified in the memorandum'.²⁵³

As McColl JA argued in *New South Wales v Briggs*, '[c]are 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'.²⁵⁴ There are dangers in judges relying on assumptions about employer and employee beliefs,

²⁴⁷ *Hegarty* (n 107).

²⁴⁸ Victoria's Submissions (n 216) [24], [55], [56]. This was not an issue considered by the Court of Appeal.

²⁴⁹ *Kozarov (VSC)* (n 129) 151–2 [676]–[680].

²⁵⁰ *Kozarov* (n 28) 144 [84] (Gordon and Steward JJ). Note the previous refusal of the High Court to grant special leave to appeal *Hegarty* (n 107): see Transcript of Proceedings, *Hegarty v Queensland Ambulance Service* [2008] HCATrans 121.

²⁵¹ *Kozarov* (n 28) 127 [17].

²⁵² *Ibid.*

²⁵³ *Ibid* 136 [53] (Gageler and Gleeson JJ), 139 [64] (Gordon and Steward JJ).

²⁵⁴ *New South Wales v Briggs* (n 27) 476 [28] (McColl JA). Cf at 497–500 [126]–[131] (Leeming JA).

wishes and behaviour in the absence of appropriate evidence.²⁵⁵ Early intervention approaches to identifying and treating workplace psychiatric injury are evidence-based, best practice approaches, which are embedded into WHS requirements.²⁵⁶ Coherence of negligence principles with relevant legislative WHS principles would favour a proactive and reactive duty of care of employers to identify that an employee is at risk of psychiatric injury and intervene early to respond (where appropriate) in a sensitive, supportive and confidential manner. This would also be consistent with modern workplace management and limit the reinforcement of ‘stigma about mental illness, which increases rates and effects of injury’.²⁵⁷

E *Unresolved Areas: Workplace Investigations, Management and Termination*

The High Court has not yet decided a case where psychiatric injury resulted from performance management, a disciplinary or investigative process, or suspension or termination of employment.²⁵⁸ It is in these cases that arguments about coherence have the most salience. This is an area ripe for further consideration.²⁵⁹ As discussed in Part III, state courts have refused to hold that an employer has a duty of care to exercise a contractual or legislative right concerning disciplinary investigations, performance management or termination in a way which considers the risk of psychiatric injury.²⁶⁰

A duty of care may not, however, always be incoherent with either the employment contract or relevant legislation. Much will depend on the facts, context, employment contract and legislative framework applicable to each case. There may be cases where an employer has acted in a way which was so unreasonable and inconsistent with the employment contract or industrial legislation — for example, failing to provide procedural justice, acting in a discriminatory manner, acting in bad faith, or acting where there is no evidence of grounds for action — that a duty of care would be entirely consistent and coherent with other areas of law.²⁶¹ A duty of care was recognised in a recent Queensland case arising from a failure to provide adequate support during an investigation when psychiatric injury arose from a

²⁵⁵ Ibid 477 [30] (McColl JA).

²⁵⁶ See, eg, *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ss 36EA–36ED, ch 4 pt 5A.

²⁵⁷ Tristan W Casey, Xiaowen Hu, Qian Yi Lee and Clarissa Carden, *Stigma towards Injured or Ill Employees: Research on the Causes and Impact of Stigma in Workplaces, and Approaches to Creating Positive Workplace Cultures that Support Return to Work* (Report for Safe Work Australia, June 2021).

²⁵⁸ See the text accompanying n 128 in relation to the withdrawal of special leave by the High Court in the *Govier* case.

²⁵⁹ Adriana Orifici describes the area of the legal dimensions of workplace investigations, including negligence law, as ‘complex, fragmented and unsettled’: Orifici (n 125) 1075.

²⁶⁰ For discussion of the state cases, see Sappideen, O’Grady and Riley (n 110) [6.580]. See also *Potter v Gympie Regional Council* (n 208).

²⁶¹ See, eg, *Ackers* (n 233) 430 [241] (Henry J) (‘There is no logical incompatibility between the existence of the right to require competent job performance and liability in negligence for a breach of the duty of care to avoid foreseeable risk of psychiatric injury, if the breach involves a process of purported correction of job performance which is carried out in bad faith or contrary to the employer’s own processes and procedures’). See also Sappideen, O’Grady and Riley (n 110) [6.580].

hostile workplace environment.²⁶² Recently, the Federal Court held an employer responsible for injury suffered following inappropriate conduct by a manager against an employee which was considered by the manager to be in the nature of performance management.²⁶³ There was held to be both a breach of a duty of care in negligence and an entitlement to compensation under the *Fair Work Act 2009* (Cth) due to the employer taking unlawful adverse action against the employee which caused her injury.²⁶⁴ The better view is that a duty of care owed to an employee concerning the risk of psychiatric injury in cases of performance management, investigation and disciplinary action may not always be inconsistent or incoherent with an employment contract or other areas of law.

VI Conclusion

The economic, social and individual costs of workplace psychiatric injury in Australia are high. Multiple government reports and inquiries have recognised that Australian law has failed to properly regulate and respond to psychosocial workplace hazards and to prevent workplace psychiatric injury. This recognition has resulted in reform of WHS legislative frameworks and closer attention by WHS regulators to ensure employers fulfil their obligations to identify, manage and ameliorate psychosocial workplace hazards. Australian negligence law has not kept pace with these developments. Following *Koehler*, the High Court took a restrictive approach to employer liability. This was caused by lack of judicial focus on the critical role of psychosocial workplace hazards in employee psychiatric injury; an approach to the cohesiveness of negligence principles with other areas of law (particularly contract law) which limited rather than expanded liability; and a focus by courts on ‘legal policy’ concerns such as individual responsibility, autonomy and privacy.

The recent High Court decision in *Kozarov* heralds some promising signs of change. The High Court recognised that a proactive and reactive duty of care may arise from the inception of an employment contract and may extend to both physical and psychiatric injury. This is particularly so when evidence exists that psychosocial hazards inherent in the very nature of the work presented a risk to the psychiatric health of all employees and the employer was aware of this risk. Merely contracting to perform a ‘risky’ job is not inconsistent with a duty of care. Evident signs that an employee is at individual risk of injury will not be required in all cases to engage a duty of care. Signs or indications of pending injury to an employee after employment may, of course, remain relevant to determining whether an employer has breached its duty by failing to take further precautions or failing to implement its WHS system.

Many questions remain. It is unclear whether categories of injury outside vicarious trauma (for example, excessive work cases such as *Koehler*) will be treated differently following *Kozarov*. Does *Kozarov* signal judicial acceptance more

²⁶² *Hayes v Queensland* (n 212). The Queensland Court of Appeal ultimately held (Dalton and Mullin JJ, Margaret McMurdo P dissenting) that causation was not proven. Cf *Potter v Gympie Regional Council* (n 208) [33]–[36] which distinguished *Hayes*.

²⁶³ *Leggett v Hawkesbury Race Club Limited [No 3]* (n 67).

²⁶⁴ *Ibid.*

generally of the role of psychosocial workplace hazards in workplace psychiatric injury, and a shift away from inaccurate judicial understandings of individual susceptibility to injury as the sole or main risk factor? The High Court in *Kozarov* did not fully consider the relevance of contracts of employment in determining the content or scope of duty of care. If courts continue to stress the importance of coherence, it must be asked: what law and what legal policy concerns should negligence principles be coherent with, and how should coherence conflicts be resolved? A proper consideration of coherence in negligence cases requires consideration of the legislative framework which supplements, and sometimes restricts, contractual employment obligations.

This article suggests that negligence law should develop in ways which are consistent and coherent with WHS regulation. The role of legal policy concerns such as privacy and autonomy in determining the content of a duty of care should be restricted to the extent such considerations conflict with WHS or industrial legislative obligations or do not represent best practice WHS approaches such as early intervention. While Australian negligence law has experienced some change of direction post *Kozarov*, the failure of the High Court to overrule the *Koehler* decision and to clarify the role of ‘coherence’ means it may remain difficult for some injured employees to recover in negligence for their psychiatric injuries. Further development of negligence law which brings it into coherence with the Australian legislative regulatory landscape, and which adequately recognises the nature of workplace psychosocial hazards, is required. This should result in a recognition that all employers owe a proactive and reactive duty of care to their employees to provide psychologically safe workplaces. Whether an employer is legally responsible for an employee’s workplace psychiatric injury should be determined as physical injury cases are — ultimately by determining whether, on the evidence in each case, that duty has been breached causing the employee’s injury.