HIGH COURT OF AUSTRALIA

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File Number:	M36/2021
File Title:	Kozarov v. State of Victoria
Registry:	Melbourne
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	06 Aug 2021

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 36 OF 2021**

BETWEEN: **ZAGI KOZAROV**

Appellant

AND: **STATE OF VICTORIA**

Respondent

SUBMISSIONS OF THE RESPONDENT

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES PRESENTED BY THE APPEAL

2. The personal circumstances of the appellant are poignant. The grounds of appeal, however, turn only on the question of causation. That is whether the matters required by way of a reasonable response from the respondent would have avoided the harm caused to the appellant. This question must be considered in light of three factual findings, none challenged by the appellant.

3. **First**, that it was not until (at the earliest)[1] late August 2011 that the respondent was required to offer the appellant welfare screening and rotation out of the SSOU.[2] **Second**, that only ceasing to work in the SSOU would have avoided the harm caused by the respondent's breach of duty.[3] **Third**, that fixed-term, mandatory rotations out of the SSOU were not a necessary component of that duty of care.[4] Rather, what was required was the *option* of rotation being presented to the appellant, in the context of a "supportive welfare inquiry".[5]

4. If what was required was the offer of rotation, the question for causation is whether the appellant would have cooperated and accepted that offer. If she would not, the harm would not have been avoided. The Court of Appeal was not satisfied on the balance of probabilities that the appellant would have so cooperated.[6] There is no error that would warrant this Court revisiting that finding. It was properly made by an intermediate appellate court undertaking a "real review" of the evidence at trial, consistent with this Court's commands.[7]

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1 By its notice of contention, the appellant contends that the risk of harm was not reasonably foreseeable until 9 February 2012: CAB 353.

2 *Kozarov v State of Victoria* (2020) 294 IR 1 (**VSC**), [622]-[623] CAB 205.

3 VSC [733] CAB 240, [742] CAB 240-241.

4 VSC [689] CAB 226.

5 VSC [691]-[692] CAB 227.

6 *State of Victoria v Kozarov* (2020) 301 IR 446 (**VSCA**), [110] CAB 328.

7 See *Lee v Lee* (2019) 266 CLR 129 at 149 [56] (Bell, Gageler, Nettle and Edelman JJ): "It was the duty of the Court of Appeal to persist in its task of 'weighing [the] conflicting evidence and drawing its own inferences and conclusions', and, ultimately to decide for itself which of the two hypotheses was the more probable." Cf **AS [25(a)]**.

5. The respondent accepts that the appeal raises the two issues identified by the appellant's written submissions (**AS**): **AS [3]**. The respondent's notice of contention (**NOC**) raises the following further issue:

   (a) whether the trial judge erred in finding that the respondent was on notice of a risk to the appellant in particular in August 2011, so as to require steps including an offer of referral for occupational screening and rotation out of the SSOU.

6. The issue raised by the NOC was the respondent's first ground of appeal before the Court of Appeal.[8] It raises questions of the kind considered by this Court in *Koehler v Cerebos (Australia) Limited*[9] as to the intersection between the law of tort, the contract of employment, and mental illness. This Court would find that the respondent was entitled to assume that in the absence of evident signs warning of the possibility of psychiatric injury, the appellant was able to do the job she contracted to do: work as a senior solicitor in a specialist sex offences unit. Risk of psychological injury to the appellant was not reasonably foreseeable until February 2012.

7. Rather, as at August 2011, the appellant was affronted when faced with the suggestion she was not coping with her work and should consider leaving the SSOU. To require that this senior solicitor's employer foist upon her "psychological screening" — at a time when the appellant's own psychologist had not identified any work-related mental illness[10] — is to impose an impossible standard of care. Moreover, it is to require drastic and unwarranted intrusions into the private lives of employees in a manner inconsistent with both the common law's respect for the privacy of the individual[11] and statutory protections from discrimination afforded to employees suffering from mental illness.[12]

PART III SECTION 78B NOTICE

8. No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

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8 VSCA [5] CAB 285.

9 (2005) 222 CLR 44 (***Koehler***).

10 VSC [333] CAB 104.

11 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

12 See, eg, *Equal Opportunity Act 2010* (Vic), ss 4(1), 6(e), 18.

PART IV FACTS

9. The respondent accepts the accuracy of the facts repeated at **AS [9]-[19]**, but would add to that recitation the facts set out below. As for **AS [20],** the appellant misstates the respondent's case both at trial and on the notice of contention: properly understood, it is that psychiatric injury to the appellant was not reasonably foreseeable until 9 February 2012.

The contract of employment

10. The appellant's initial contract of employment with the respondent was for a fixed-term role at VPS Grade 4 as a solicitor in the SSOU, commencing on 22 June 2009.[13] The fixed-term was subsequently extended.[14] On 5 May 2011, she signed an offer of employment for another fixed-term role as an acting VPS-5, again in the SSOU, from 28 April 2011 to 15 August 2011.[15] On 28 August 2011, she applied for a permanent VPS-5 role in the SSOU.[16] She was offered that position on 3 November 2011, and signed a contract of employment on 9 November 2011.[17] It was not in dispute at trial that the appellant was employed not in the OPP at large, but as a solicitor in the SSOU. That is the work she contracted to do.[18]

11. The SSOU was a specialist unit with the OPP established with the purpose of developing specialist expertise in the prosecution of serious sex offences. Its aims were to achieve a high success rate in prosecuting sex offences, improve support to victims, develop expertise and deliver greater consistency in prosecutions.[19] The appellant acknowledged that she understood this was the job she was accepting when she commenced at the SSOU.[20] It is not in dispute that the appellant suffered from PTSD and Major Depressive Disorder (**MDD**), and that the harm was caused by her exposure to graphic and distressing material involving the sexual assault of children and adults whilst working in the SSOU.

13 Contract of employment dated 9 June 2009: Respondent's Book of Further Materials (**RFM**) at #36.
14 VSC [45] CAB 19.
15 Contract of employment dated 3 May 2011: RFM at #49.
16 VSC [46] CAB 20.
17 VSC [45] CAB 19.
18 Contract of employment dated 3 November 2011: RFM at #51.
19 VSC [53] CAB 22.
20 VSC [59] CAB 23.

August 2011 to January 2012

12. On 11 August 2011, the appellant became unwell at work and went home early.[21] She was on sick leave until 29 August 2011.[22] The appellant gave evidence that she did not know why she was unwell at that time, but believed it was "stress-related".[23] On 22 August 2011, she attended her general practitioner and was referred to psychologist George Foenander, whom she consulted with on 23 August 2011. No diagnosis of work-related PTSD was made at this time.[24] Nor was the fact of these consultations known to the respondent.[25]

13. On 29 August 2011, the appellant returned to work. She had a dispute in the morning with her manager Mr Brown. The dispute arose out of his perception that the appellant had arrived late to work.[26] The appellant recorded the substance of her interactions with Mr Brown that morning in two emails, which she described as "file notes" of the incident.[27] The emails are set out in full in the reasons of the Court of Appeal.[28]

14. Relevantly, the appellant recorded that Mr Brown had stated "Zag you are just not coping with your work, I can't allocate any files to you". She responded saying "I wanted you to point out where you feel I was not coping", but Mr Brown "could not point to anything in my work". The appellant went on: "In a recent file review you praised me for 'not dropping the ball despite all going on in my life' and now you are saying I am not coping? I fail to see how?". She stated that she felt "discriminated against as a single mother … [y]ou have made me feel I have no hope for permanent that I submitted application for yesterday [sic]".[29] The email concluded:[30]

> [Mr Brown], with the greatest if [sic] respect I am sorry but I can not come in for the rest of the day … I will be asking to make an appointment with Stuart Ward in the next day or so as I feel clearly discriminated against that now I will never stand any chance if [sic] promotion in the unit and that I have been topic of

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21 VSC [257]-[259] CAB 82.
22 VSC [259] CAB 82.
23 VSC [259] CAB 82.
24 VSC [263]-[264] CAB 83-84.
25 VSC [591] CAB 194.
26 VSCA [45] CAB 299.
27 VSC [268] CAB 85.
28 VSCA [46], [48] CAB 299-302.
29 VSCA [46] CAB 300-301.
30 VSCA [46] CAB 301.

> conversation within the team …
>
> I still fail to see how I have failed you, my work is up to date …

15. It will be recalled that the appellant had, the day prior, applied for the permanent VPS-5 role in the SSOU (see [10] above). The appellant's manager, Mr Brown, was aware of personal family issues the appellant had experienced,[31] and the appellant had previously confided in him about those issues.[32]

16. Mr Brown responded that the email was not a fair record of their conversation, and that he had sought her out in her office and attempted to call her.[33] The appellant replied via email and indicated she had gone home for the rest of the day, and continued:[34]

> I have Not gone to Stuart Ward about this, I am merely refereeing (scil, referring) to the comment you made about me not being suitable for the demanding unit and the discussion about perhaps I should be thinking about going to the other building and Stuarts name was mentioned.
>
> I want to make it clear that I am passionate about continuing my work in the sexual offences unit and l don't want to leave the unit and don't believe that I should be made to feel like I am not coping when the work load calendar clearly reflects my deadlines and workload. I have kept up to date with my work and always remained committed and dedicated to ssou. I believe we can discuss this together, I am even open to having an independent person present if necessary. You did state that you were not the only person that held the view, perhaps that person could help shed some light as to how I am not coping due to my 'other issues'. If you feel it necessary to go to Stuart Ward about any issues of concern you may have with me, then I am happy to attend a meeting with him too. [emphasis added]

17. From 29 August 2011 until the end of December 2011, the appellant continued working in the SSOU. During this time, she consulted with Mr Foenander again on two occasions.[35] He did not advise her to rotate out of the SSOU.[36] The appellant was also subject to a performance review conducted by Mr Brown. The appellant and Mr Brown co-signed the review document on 13 September 2011, recording that the appellant was meeting all of her performance outputs.[37]

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31 VSC [300] CAB 95.

32 VSC [304] CAB 95-96; VSCA [46] CAB 301.

33 VSCA [47] CAB 301-302.

34 VSCA [48] CAB 302.

35 VSC [278] CAB 89, [281] CAB 90.

36 VSC [333] CAB 104.

37 VSC [288] CAB 91, [314] CAB 98, VSCA [50] CAB 303.

18. The appellant was successful in her application for the permanent Grade 5 position, which was offered on 3 November 2011 and accepted on 9 November 2011.[38] She conceded that she knew this promotion would increase her workload.[39]

19. Earlier, on 10 October 2011, the appellant had applied to take annual leave and long service leave.[40] She commenced that leave in January, and was to return on 13 February 2012.[41] On the morning of 9 February 2012, the appellant emailed OPP managers notifying them of "serious return to work issues", and requesting transfer from the SSOU.[42] The respondent accepted at trial that the risk of psychiatric harm to the appellant was reasonably foreseeable from this date, but contended it subsequently took all reasonable steps to protect her from harm.[43]

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PART V ARGUMENT ON THE NOTICE OF APPEAL

20. The appellant's two grounds of appeal start from a mistaken premise as to the course of the trial and the conclusions of the trial judge on the facts as found. These facts were, **first** that the risk of harm of psychiatric injury to the appellant was not reasonably foreseeable until the end of August 2011.[44] (The respondent's contention is for the later date of 9 February 2012: see [49]-[55] below). **Second,** as at the end of August 2011, the appellant was already suffering from PTSD as a result of her work in the SSOU.[45] **Third,** the only course of action that would have avoided the further harm suffered after that point, including the development of MDD, was for the appellant to stop doing the specialist sex
20 offence work she was contracted to do.[46]

21. Where the Court of Appeal diverged from the trial judge was in finding that it was not the more probable inference that the appellant would have cooperated with offers to alter her work duties at the end of August 2011. Rather, in the face of her vehement reaction to a suggestion she was not coping, combined with her seeking promotion at the relevant

38 VSC [317] CAB 99.
39 VSC [315] CAB 98.
40 VSC [291] CAB 92-93.
41 VSC [291] CAB 92-93, [320] CAB 100.
42 VSC [320]-[321] CAB 100-101.
30 43 VSC [16]-[17] CAB 14.
44 VSC [680]-[682] CAB 224.
45 VSC [717] CAB 235.
46 VSC [692] CAB 227, [736]-[742] CAB 241-244.

time, the Court of Appeal was not satisfied that critical factual matter was proven. That analysis is unimpeachable. To explain why, it is necessary to first consider matters of principle, and second to consider the conclusions the trial judge in fact reached.

The relevant principles

22. The relevant principles are as follows. *First,* the content of the duty owed by an employer to take reasonable care to avoid psychiatric injury must be considered in the context of the other obligations owed by the parties to one another "under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions".[47] *Second,* an employer engaging an employee to perform stated duties is entitled to assume the employee considers that he or she is able to do that job: "[i]nsistence upon performance of a contract cannot be a breach of a duty of care".[48]

23. *Third,* the appropriate response required of employers must take into account that in some jobs, exposure to inherently traumatic events is inevitable.[49] The *Shirt* calculus requires consideration of the practical difficulties of imposing a postulated system of work in such workplaces.[50] *Fourth,* in the context of psychiatric injury to employees, it is wrong to frame the duty of care at the same level of generality adopted in respect of physical injury. Rather, whether psychiatric injury to the particular employee is reasonably foreseeable "invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned".[51] Whether a risk of psychiatric harm is perceptible may depend on the "vagaries and ambiguities of human expression and compression".[52]

24. *Fifth,* the imposition of a positive duty to take active steps to prevent the risk of foreseeable injury must take into account the private and personal nature of psychological illness and the dignity of employees and their entitlement to undertake their chosen work

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47 *Koehler* (2005) 222 CLR 44 at 53 [21] (McHugh, Gummow, Hayne and Heydon JJ).

48 *Koehler* (2005) 222 CLR 44 at 56 [29] (McHugh, Gummow, Hayne and Heydon JJ).

49 *New South Wales v Fahy* (2007) 232 CLR 486 at 509 [71] (Gummow and Hayne JJ), see also 549 [208]-[209] (Callinan and Heydon JJ).

50 *Wyong Shire Council v Shirt* (1980) 146 CLR 40

51 *Koehler* (2005) 222 CLR 44 at 57 [35].

52 *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81–919 at 70,352 [41] (Keane JA).

free of harassment and intimidation.[53] In imposing a duty to monitor and respond to potential psychological ill-health, "a compelling case would be required before the private affairs of an employee are subjected to scrutiny by an employer".[54]

25. Thus, before imposing a duty to require an employee be psychologically counselled, courts must take account of who might reasonably be in a position to direct such counselling and the consequences that would flow in the event the employee refused to accept counselling.[55] There are readily perceptible difficulties: is an employee who accedes to a suggestion to undertake counselling required to report back to supervising officers, provide updates on their progress, or disclose other medical or psychological assistance being received?[56] These competing factors have led courts to conclude that there cannot be a duty to inquire about private matters in ordinary cases,[57] the employer must be on notice of the risk of psychiatric harm to the specific employee.[58]

26. Finally, in undertaking the counterfactual analysis necessary in determining causation — whether if steps had been taken, injury would have been avoided — a Court must proceed on the assumption that everyone acts in strict performance of their legal duties. Courts do not conduct counterfactual analyses on a basis other than one which the law itself would countenance: the policy of the common law demands otherwise.[59] As the Court of Appeal of the Supreme Court of Victoria remarked in *The Age Company Limited v YZ,* the particular nature of psychological harm is such that "it may be difficult to establish that, had the proposed steps been taken by the employer, the injury would be avoided".[60]

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53 *Taylor v Haileybury* [2013] VSC 58 at [116] (Beach J), discussing *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81–919 at 70,352 at [41]-[43] (Keane JA).

54 *State of New South Wales v Briggs* (2016) 95 NSWLR 467 at 497 [126] (Leeming JA, Ward JA agreeing).

55 *The Age Company Limited v YZ* (2019) 60 VR 189 at 214 [122] (Niall, T Forrest and Emerton JJA), discussing *State of New South Wales v Briggs* (2016) 95 NSWLR 467 at 497 [126] (Leeming JA, Ward JA agreeing) and *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81-919.

56 *State of New South Wales v Briggs* (2016) 95 NSWLR 467 at 497 [126] (Leeming JA, Ward JA agreeing).

57 *State of New South Wales v Briggs* (2016) 95 NSWLR 467 at 497 [126] (Leeming JA, Ward JA agreeing).

58 See *The Age Company Limited v YZ* (2019) 60 VR 189 at 197 [5], [36]-[52] (Niall, T Forrest and Emerton JJA).

59 *Lewis v Australia Capital Territory* (2020) 94 ALJR 740 at 753 [37] (Gageler J), 762 [90] (Gordon J), 783 [178] (Edelman J).

60 (2019) 60 VR 189 at 216 [132] (Niall, T Forrest and Emerton JJA).

The findings of the trial judge

27. Consistently with the authorities, the trial judge and the Court of Appeal recognised that in determining the scope and content of the duty of care, it was necessary to consider whether the respondent was on notice of the risk to the appellant.[61] The trial judge undertook this analysis consistently with this Court's reasoning in *Koehler,* by looking to "evident signs" warning of a possibility of psychiatric risk to the appellant.[62]

28. It was in this context that the trial judge found that the confrontation with Mr Brown at the end of August 2011 constituted a "sentinel event" that should have put the respondent on notice that the appellant was at risk of mental harm by reason of the nature and content of her work.[63] The timing is challenged by way of the respondent's notice of contention. But accepting it for the sake of the appellant's first ground of appeal, the important finding that followed is that the only course of action, at the end of August 2011, that would have avoided the harm suffered was for the appellant to stop doing the work she contracted to do. There is an unchallenged finding of fact that the appellant was already suffering from PTSD by April 2011.[64] The liability of the respondent depended on the finding that the appellant's condition worsened from August 2011, and that worsening of condition was a result of a breach of duty by the appellant.

29. This meant that the critical question of causation was whether the appellant had established, on the balance of probabilities, that the measures (requiring her cooperation) would have been taken, that the trial judge considered necessary in order to prevent the exacerbation of the appellant's PTSD from late August 2011. That is the only basis on which liability of the respondent was founded.[65]

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61 It should be noted that no challenge is made in this Court to the analysis in the authorities as to the employer's duty of care in the context of psychological harm. It can be taken that the appellant accepts the analysis in those authorities, including *Koehler* (2005) 222 CLR 44.

62 (2005) 222 CLR 44 at 57 [36] (McHugh, Gummow, Hayne and Heydon JJ): VSC [578] CAB 187, VSCA [62] CAB 306.

63 VSC [598] CAB 196.

64 VSC [736] CAB 241-242; VSCA [94] 322.

65 The respondent did not attempt to disaggregate its liability for damages for the exacerbation of the appellant's condition: it accepted liability for the whole of the loss notwithstanding its duty did not arise until August 2011: VSCA [101] CAB 325.

30. The appellant's own expert evidence — accepted by the trial judge — was that "because the [appellant] was not rotated out of her position at an earlier time, she faced risks of further exposure to the trauma".[66] This was the evidence of both Professor McFarlane ("continued traumatic exposures experienced by [the appellant] once she was suffering from symptoms … contributed to the chronicity of her PTSD and the probability of a poorer prognosis"[67]) and Dr Dharwadkar (once the appellant had begun to experience symptoms, it was necessary for her work duties to be altered so that "work in sex offence cases [was] excluded"[68]). And this was the express basis for the finding of liability by the trial judge: that failure to implement a welfare inquiry, offer occupational screening, with the "option to rotate her from the SSOU in response to the outcome of the screening" meant the "opportunity to prevent or reduce her injury around the end of August 2011 was missed".[69]

The reasons of the Court of Appeal

31. The Court of Appeal summarised the trial judge's causation finding as being comprised of three critical steps: **first,** that after the respondent was on notice at the end of August 2011 of the appellant's state, it should have offered her occupational screening (and she would have accepted that offer). **Second,** that this work-related occupational screening would have revealed her work-related symptoms of PTSD. **Third,** that this process would have prompted reduction of the appellant's exposure to trauma, by altering work allocation, arranging time out, or rotation to another role.[70]

32. The Court of Appeal was satisfied that each of the first and second steps were proven on the balance of probabilities. But it was not satisfied that it could be concluded that on the balance of probabilities, the taking of the first and second steps would have resulted in the appellant accepting a rotation out of the SSOU at any time between the end of August 2011 and February 2012.[71]

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66 VSC [733] CAB 240-241.
67 VSCA [93] CAB 322.
68 VSCA [95] CAB 322.
69 VSC [742] CAB 243.
70 VSCA [102] CAB 325.
71 VSCA [104]-[105] CAB 326-327.

The first ground of appeal

33. The appellant's first ground of appeal impugns the Court of Appeal's finding that it had not been proven on the balance of probabilities that had the respondent complied with its duty, the appellant would have accepted rotation out of the SSOU.

34. The trial judge had concluded otherwise on the basis of the appellant's cooperation with exploring alternative roles at the OPP after 9 February 2012.[72] The Court of Appeal considered the circumstances as they pertained at the end of August 2011, and concluded otherwise. It took into account that: (a) the appellant had responded to the suggestion from Mr Brown that she was "not coping", and that further files could not be allocated to her, with vehement opposition; (b) the appellant stated that she should not be made to feel as though she was not coping, that she did not want to leave the SSOU, and that she was passionate about her work; and (c) the appellant suggested that her manager was discriminating against her in suggesting she was not coping at work.[73]

35. The Court of Appeal also considered that the appellant had applied, the day prior to her interaction with Mr Brown, for promotion in the SSOU.[74] She continued to progress that application, was successful, and was offered and accepted a higher paying position in the SSOU. Importantly, this all occurred against the backdrop of the appellant consulting with Mr Foenander (unbeknownst to the respondent) and advising him of the work-related stressors that were contributing to her poor mental health at that time.[75] Mr Foenander did not advise the appellant to cease working in the SSOU until 20 February 2012.[76] He had not identified as at August 2011 that she could be suffering from work-related psychiatric injury.

36. These are compelling facts for an opposite inference, that the appellant would not have cooperated with attempts to rotate her out of the SSOU in August 2011. Given the totality of the evidence and the inferences that may properly be drawn, the state of the evidence was not such that it could be said that the inference of cooperation with "rotation out" had

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72 VSC [733] CAB 240-241.

73 VSCA [108]-[109] CAB 328.

74 VSCA [109] CAB 328.

75 VSC [278]-[283] CAB 89-90.

76 VSC [333] CAB 104.

a greater degree of likelihood than any other competing inference.[77]

37. It remains to consider the particular complaints made by the appellant. **First,** the Court of Appeal did not erroneously limit the consideration of the "action" necessary to prevent the exacerbation of PTSD to "rotation out", when the trial judge had referred to "altering work allocation, or arranging time out, or rotation to another role" (**AS [28]-[29]**). Whilst the trial judge found that variously described actions formed part of the respondent's duty, the expert evidence and the finding of fact was that "the [appellant] needed to be rotated out of the SSOU".[78] That is the only "action" that would have prevented the exacerbation of her injury.

38. Moreover, paying close attention to the alternative actions that the appellant now postulates — "altering work allocation" or "arranging time out" — both would have practically involved rotation out of the SSOU. It was a specialist sex offences unit. An alteration of work allocation so as not to expose the appellant to sex offences meant she would be, in effect, not working in the SSOU. Similar considerations attach to "arranging time out". Whatever form "time out" might take, as a matter of practicality it meant not working as an SSOU solicitor, because exposure to graphic and traumatic material was — unfortunately— an inherent part of that position.

39. **Second,** the Court of Appeal did not "overlook" or "set to nought" the fact that the welfare enquiry and screening would have revealed PTSD and it would have played on the appellant's mind in considering whether to accept a move away from the SSOU (**cf AS [33]-[35]**). The Court of Appeal expressly noted those factors in undertaking its review of the evidence at trial.[79] It simply did not agree that in light of all the evidence, acceptance of rotation was the more probable inference. The highest that the appellant's evidence went on this point was the response of Professor McFarlane in cross-examination that in his experience as a psychiatrist, "a significant majority of people" if assessed by him and following time spent explaining their diagnosis, will take advice and then be able to "make a decision of their own accord" whether to keep working in a traumatic environment or not.[80] The evidence simply did not go as high as to establish the appellant

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77 *Amaca Pty Ltd v Ellis* (2010) 249 CLR 111, [51], [65], [70] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

78 VSC [742] CAB 243.

79 VSCA [96]: CAB 322-323.

80 Transcript, Supreme Court of Victoria (29 May 2019) at T614.14-22: RFM at #2.

would have done so; rather, the opposite inference was the more probable.

40. The **third** is that the Court of Appeal erred in finding that the respondent was precluded from mandatorily rotating the appellant out of the SSOU (**AS [38]**) and that no reliance was placed by the respondent on the contract of employment for the purpose it was invoked by the Court of Appeal (**AS [38]**). That "purpose" was the observation by the Court of Appeal that it had not been suggested the respondent could have compelled the appellant to move to another unit that did not involve work relating to sex offences, "which would have been precluded by the terms of [her] contract of employment with the [respondent] as a solicitor in the SSOU".[81]

41. Importantly, the appellant only equivocally suggested at trial that compulsory rotation should have been implemented in the SSOU, relying on the Vicarious Trauma policy which had referred to "fixed, pre-determined rotations".[82] The trial judge was not persuaded that such a system was a required measure in the SSOU, but rather that a safe system of work included the "option" of temporary or permanent rotation from the SSOU where appropriate.[83] The appellant did not advance this argument at all before the Court of Appeal, and when Senior Counsel for the appellant was asked by the Court of Appeal whether the submission was that compulsory rotation was required, the question went unanswered.[84]

42. There is a more fundamental problem with the appellant's belated suggestion that she should have been compulsorily rotated out of the SSOU. The content of the duty owed must be considered in the context of the other obligations owed by the parties to one another.[85] The appellant was employed under a contract as a solicitor in the SSOU. She was not simply employed as a "prosecutor" or in the OPP generally.[86] As to the suggestion of "altering work allocation", work allocation that did not involve sex offences either required a rotation out, or the provision of no work at all. The latter would also be inconsistent with the contract, which does not sensibly admit of some implied power to

81 VSCA [106] CAB 327.
82 VSC [98] CAB 36.
83 VSC [702] CAB 230.
84 Transcript, Court of Appeal (9 November 2020) at T82.7-8: RFM at #64.
85 *Koehler* (2005) 222 CLR 44 at 53 [21] (McHugh, Gummow, Hayne and Heydon JJ).
86 Contract of employment dated 3 May 2011: RFM at #49.

direct the appellant not to work at all.[87]

43. It is primarily to these issues that the appellant's second ground of appeal is directed. Before turning to that ground, however, the answer to the first ground of appeal is that the Court of Appeal was not satisfied that in the counterfactual analysis the harm would have been avoided. There is no reason to doubt that careful review, nor reason for this Court to interfere with it.

The second ground of appeal

44. The second ground of appeal asserts that the Court of Appeal erred in finding that it was necessary for the appellant to have cooperated with rotation out of the SSOU in order for the Court to be satisfied that in the counterfactual analysis, the harm would not have been suffered (**AS [46]**). The argument relies on the observations in *McLean v Tedman* (1984) 155 CLR 306 that it is an employer's obligation to establish and maintain a safe system of work. The appellant's argument fails to properly apply that principle to the facts of this case.

45. The trial judge did not hold that fixed term rotations out of the SSOU were required. The trial judge expressly rejected that contention.[88] What was required, her Honour found, was the option of rotation out of the SSOU. In light of these two findings, the question of causation required considering what the appellant would have done when offered rotation out of the SSOU. The "safe system of work" was that such an employee had to be offered the option.

46. The counterfactual analysis begins from the premise that everyone has acted in strict performance with their legal duties.[89] Here, the duty on the part of the employer as found was to offer rotation. There was no greater duty imposed or required of the employer by the trial judge or the Court of Appeal.

47. Moreover, it would have been (and remains) impermissible to impose a duty requiring the respondent to rotate the appellant regardless of her consent. The law of tort does not

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87 See *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633, 683 [418]-[419], 684 [424] (Rothman J). See also *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 566-567 [80] (Callinan and Heydon JJ); *Quinn v Overland* (2010) 199 IR 40 at [101]-[103] (Bromberg J); *Unsworth v Tristar Steering and Suspension Australia Ltd* (2008) 175 IR 320 at [29].

88 VSC [689] CAB 226.

89 *Lewis v Australia Capital Territory* (2020) 94 ALJR 740 at 753 [37] (Gageler J), 762 [90] (Gordon J), 783 [178] (Edelman J).

operate siloed from the other obligations between the parties.[90] It does not impose a duty that requires an employer to breach the contract of employment with its employee. A court would not impose a duty of care on an employer to terminate the employment of an employee because it considered they were not coping with their work. But that would follow from an acceptance of the second ground of appeal. It would appear to require the respondent to breach its agreement with the appellant that she was to be employed in the SSOU as a senior solicitor. It might also appear to require the respondent to breach anti-discrimination legislation designed to protect employees with disabilities, including mental illnesses, from dismissal on the grounds of that illness.[91] The result would be unworkable incoherence.

10 48. The same can be said of the argument that the employer has the "power to prescribe, warn and command and enforce obedience to his commands" (**AS [44]**). But those powers derive from and are consistent with the contract of employment and particularly the employee's duty to obey their employer's lawful and reasonable directions.[92] Concern for an employee's psychiatric well-being does not alter the effect of those obligations of contract. These are the concerns which this Court emphasised in *Koehler*:[93]

> If a contract of employment stipulates the work which an employee is to be paid to do, may the employee's pay be reduced if the employee's work is reduced in order to avoid the risk of psychiatric injury? What is the employer to do if the employee does not wish to vary the contract of employment? Do different questions arise in cases where an employee's duties are fixed in a contract of
20 employment from those that arise where an employee's duties can be varied by mutual agreement or at the will of the employer? If an employee is known to be at risk of psychiatric injury, may the employer dismiss the employee rather than continue to run that risk? Would dismissing the employee contravene general anti-discrimination legislation?

49. It is why the Court of Appeal was correct to consider the content of the duty of care in the context of the other obligations which existed between the parties. To answer the second ground of appeal, the Court of Appeal did not err in failing to consider the nature and content of the respondent's duty of care, including its obligation to maintain and

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90 See, by analogy, *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *State of New South Wales v Paige* (2002) 60 NSWLR 371 at 392 [105], 399-400 [153]-[155] (Spigelman CJ).

30 91 *Equal Opportunity Act 2010* (Vic), ss 4(1), 6(e), 18.

92 *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621.

93 (2005) 222 CLR 44 at 54 [21] (McHugh, Gummow, Hayne and Heydon JJ).

enforce a safe system of work. It simply did so with an eye to, and consistent with, the contractual relationship between the parties. It was correct in so doing, and the appeal should be dismissed.

PART VI ARGUMENT ON THE NOTICE OF CONTENTION

50. By its notice of contention, the respondent contends that the appeal should also be dismissed on the ground that the Court of Appeal erred in finding that the respondent had been placed on notice of a risk to the appellant's wellbeing from the end of August 2011. In so finding, the trial judge engaged in impermissible litigious hindsight based reasoning that obscured recognition of the "good reasons" why the law's insistence that an employer take reasonable care for the safety of employees "does not extend to absolute and unremitting solicitude for an employee's mental health even in the most stressful of occupations".[94]

51. The trial judge based her conclusion that the respondent was on notice of thirteen separate "evident signs".[95] None of these "evident signs" viewed prospectively, can reasonably be said to have put the respondent on notice of a risk of mental harm arising from the graphic nature of work in the SSOU. In particular, the staff memorandum signed in April 2011 cannot reasonably be seen as part of "signs" that the appellant particularly was at risk because of the confronting nature of the work in the SSOU. No such complaint was made in that memo, which was of an industrial nature: the signatories declared they "enjoy[ed] the challenges of sex offence files" but "complained about the amount of work they must complete".[96] The rest of the "signs" were similarly of an innocuous or ordinary industrial nature: the appellant being outspoken at staff meetings, working hard, and avoiding taking on work for which she did not have capacity.[97] The appellant's "emotional involvement" in her cases, which comprised of giving a child complainant a "nickname", is hardly suggestive of the appellant's evident unsuitability for SSOU work.[98]

52. Both the trial judge and the Court of Appeal gave most weight in terms of "signs" to the

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94 *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81–919 at 70,354 [47] (Keane JA). See also *Koehler* (2005) 222 CLR 44 at 56 [28] (McHugh, Gummow, Hayne and Heydon JJ).

95 VSC [578(a)-(m)] CAB 187-190.

96 VSCA [73] CAB 311.

97 VSC [578(b), (c), (e), (h)] CAB 188-189.

98 VSC [578(d)] CAB 188.

appellant's interaction with Mr Brown on 29 August 2011.[99] But the retrospective clinical interpretation of those emails by an expert witness of the standing of Professor McFarlane as "hyper-reactive" is not the reasonable interpretation that Mr Brown would have given those emails on that day, even assuming proper training in mental health or vicarious trauma.[100] Particularly against the backdrop of Mr Brown's knowledge of the appellant's personal family issues, it was unreasonable to expect Mr Brown or the respondent to pry or assume some underlying psychiatric condition induced by the appellant's work about which he should inquire. Indeed, his concern for the appellant's privacy is evident in his evidence, in that he attributed her presentation to "the breakup of her marriage" and the private "health issues" she was having.[101] When pressed as to why he did not ask what had caused her to take sick leave, Mr Brown — properly — responded "No, and I would never enquire as to the reasons. Its, ah, confidential".[102] When asked if it was his role to make enquiries into her mental state, he responded "I wouldn't have inquired into that … I think that would be intrusive. That's confidential. It's between her and any treating person".[103]

53. Yet the trial judge's conclusion was that this "sentinel event" required of the respondent: additional supervision of her health and wellbeing, an inquiry into whether she was in need of support, assessment or other intervention, consultation with HR about what was going on, additional supervision or monitoring, a welfare enquiry and offer of referral for screening (which would have identified her PTSD) and a resultant rotation from the SSOU or adjustment in her work allocation from sex offences to something else in the OPP.

54. That conclusion was wrong. The facts as at the end of August 2011, and at any time prior to 9 February 2012 when the appellant identified her "serious return to work issues", were not such as to require the respondent to direct the appellant to undertake workplace "screening", to enquire as to her mental health, and ultimately to forcibly remove her from her position.

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99 VSC [578(i), (j)] CAB 189, VSCA [79] CAB 316.

100 VSC [596] CAB 195-196.

101 VSC [586] CAB 192.

102 VSC [586] CAB 192.

103 VSC [587] CAB 192-3.

55. The trial judge and the Court of Appeal have formulated an unrealistic duty to intrude into an employee's mental well-being. The outcome was evidently derived from the "entirely understandable and important desire to assist persons who may be suffering from mental illness".[104] But it extends to render actionable the omission to scrutinise aspects of the appellant's private life in a manner inconsistent with the value the common law ascribes to autonomy, privacy and freedom from harassment in employment. The intrusiveness of the steps said to be required in August 2011 must be considered in light of the fact the appellant herself did not recognise the effect that her work was having on her until late 2011 and early 2012, even with the assistance of a trained psychologist. And it was not until 20 February 2012 that her own psychologist recommended that she move away from the SSOU.[105]

56. As Leeming JA observed in *State of New South Wales v Briggs,* "[e]mployees may be, and appear to be, disaffected at work because a child is dying, or because a parent can no longer recognise them, or because a relative has been convicted of a serious criminal offence, or because a spouse has left them, or for all manner of reasons wholly unconnected with their employment".[106] These reasons are why there is no general duty to inquire about mental health in ordinary cases. And it is why the "evident signs" relied upon by the trial judge and the Court of Appeal, carefully considered, are not "evident signs" of mental harm attributable to the nature of work in the SSOU at all. Rather, consistent with the evidence of those who were required to "interpret" those "signs", it was entirely reasonable for Mr Brown to attribute those matters to the appellant's private affairs and "withdra[w] to a respectful distance".[107] That situation continued until 9 February 2012, and the Court of Appeal erred in finding otherwise.

104 *State of New South Wales v Briggs* (2016) 95 NSWLR 467 at 497 [127].

105 VSC [333] CAB 104.

106 (2016) 95 NSWLR 467 at 498 [128].

107 *New South Wales v Fahy* (2007) 232 CLR 486 a 508-509 [69] (Gummow and Hayne JJ).

PART VII TIME ESTIMATE

57. The respondent would seek no more than two hours for the presentation of the respondent's oral argument.

Dated: 6 August 2021

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