HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M36 / 2021

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF VICTORIA

BETWEEN:

ZAGI KOZAROV
Appellant

and

STATE OF VICTORIA
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

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Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of the propositions in chief: Notice of appeal

2. Subject to the Court's convenience, we propose to deal with the two grounds of appeal in chief, leaving the notice of contention to our reply.

The facts

3. On the appeal, save for inference drawn by the Court of Appeal which founds the first ground of appeal, no factual issues arise.

- AS, [9]-[20].

4. There are five documents of note:

(a) The Vicarious Trauma Policy recorded that "[r]esearch regarding VT indicates [VT] is an unavoidable consequence of working with survivors of trauma" and "[t]he response to working with trauma survivors is often referred to as 'burnout'": TJ, [94] (RBFM / Vol 4 / Tab 25 esp at 1148).

(b) The Penhall Memorandum in May 2009 noted that SSOU solicitors had "experienced a marked increase in the symptoms associated with stress": and that it was not the first time they had experienced "a heightening of such symptoms". Amongst other suggestions to combat the effects of stress and feelings of being overwhelmed, "in recognition of the labour (and emotional) intensity of our work, some sort of 'Flex time' arrangement structured 'Time out'" was suggested by staff: TJ, [141], [144], [155] (RBFM / Vol 4 / Tab 34 esp at 1279, 1282).

(c) The April 2011 Memorandum authored by SSOU staff recorded they were "not coping", the trial judge referring to it as an "unusual feature of the foreseeability analysis": TJ, [161], [620] (RBFM / Vol 4 / Tab 12 esp at 1100-1105).

(d) The June 2011 Business Case Plan in which Mr Brown, the appellant's manager, reported to OPP Executive that staff are reporting "burnout", that there are "serious OHS risks looming" and "these issues have previously been brought to the attention of the Executive": TJ, [176] (RBFM / Vol 4 / Tab 27 esp at 1180).

(e) The appellant's email dated 29 August 2011 which records Mr Brown and others stating the appellant was not coping: TJ, [266] (RBFM / Vol 4 / Tab 14 esp at 1111-1113).

Ground (1): The Court of Appeal erred in overturning the trial judge's inferential reasoning

5. The Court of Appeal accepted two important inferences that had been made by the trial judge, namely that, if offered screening in August 2011 (CA, [105]):

(a) the appellant would have taken up that offer; and

(b) that work-related occupational screening would likely have revealed work-related PTSD.

6. There is no challenge to those findings on this appeal.

7. The gravamen of the error of the Court of Appeal was two-fold:

(a) The respondent was to reduce exposure to trauma by the options of rotating to another role or arranging time out or altering case allocation, following the offer of optional work-related screening. The Court of Appeal conflated these two

steps – the options did not require the consent of the employee, only the offer did; and

(b) It impermissibly overturned the further inference – properly made by the trial judge – namely that the appellant would, in any case, have co-operated with rotation out of the SSOU.

8. And so:

(a) **First**, the Court of Appeal overlooked how the appellant ran her case at trial – the appellant's case was not that rotation was the only option available, rather the expert evidence upon which she relied was that what was required was to modify work exposure to the traumatic material: TJ, [733], [737], [738], [739], [741]; cf. CA, [106].

(b) **Second**, the failure to engage in a "real review" of the evidence.

- *Lee v Lee* (2019) 266 CLR 129 at 148 [55].
- TJ, [600], [718], [736] (lack of insight); [418], [714] (devotion to work), referring to the evidence of Professor McFarlane and Dr Dharwadkar.
- TJ, [343], [350], [733], [775], referring to the appellant's conduct in exploring other options after recognition of the effects of her work after February 2012.
- TJ [268], [393], [394], [597], demonstrating that the 29 August email showed considerable distress, rather than any probative intent.
- The circumstances in February 2012 were <u>not</u> "plainly very different" to August 2011, other than the appellant had, by then, recognised the effects of her work: cf. CA, [108]; TJ, [775].

9. The error of the Court of Appeal:

(a) involved contradictions and errors: AS, [31], [33]; CA, [96], [105], cf. [108]

(b) was contrary to common sense: AS, [35]; and

(c) failed to consider the expert evidence before the trial judge: AS, [37]; TJ, [393] (state of mind as at August 2011), [406] ("significant majority of people … will take advice"), [418], [714] (devotion to work).

10. In summary, the effect of the Court of Appeal's finding is that the appellant – fully aware of her diagnosis of PTSD – would acknowledge the risks and consent to the risk by continuing to work, thereby obviating the requirement of the respondent to enforce a system of work designed to prevent the foreseeable risk of injury: TJ, [775]; cf. CA, [110].

- cf. *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 517-518 per Mason CJ.

Ground (2): Failure to consider the proper scope of the duty of care

11. It is uncontroversial that the respondent, like all employers, had a duty to prevent the risk of psychiatric injury to the appellant in doing the traumatic work: TJ, [702]; CA, [102].

12. To say that the breach did not cause the damage suffered is to impermissibly confine the scope of the duty; causation cannot be allowed to distort the scope, content of the duty of care and the question of breach: TJ, [702]-[704]; cf. CA, [110].

13. The duty of care in this case (and in other cases) cannot be subject to the wishes of

employees who are at risk of injury especially where a consequence of PTSD is dedication to the work at a cost to self. That is, to allow the appellant to work after August 2011 was not the conduct of a reasonable employer: TJ, [403] (active management); [418], [652], [714], [718] (devotion to work); cf. CA, [108].

- *McLean v Tedman* (1984) 155 CLR 306 at 313-314.

14. "[T]be employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system". That involves having regard to the fact that the employer has the power to "prescribe, warn and command and enforce obedience to his commands": cf. CA, [106].

- *McLean v Tedman* (1984) 155 CLR 306 at 313-314.

15. The respondent was required to rotate or provide time out to the appellant as and from August 2011, and there was no evidence the respondent could not do so: TJ, [688], [733].

16. It was never argued at trial that the contract of employment precluded rotation, or any other options, to reduce her exposure to work trauma. Indeed, the respondent conceded there was nothing to stop the OPP moving or rotating people: TJ, [688], [733]; cf. CA, [106]; ABFM, Tab 3.

Part III: Outline of the propositions in reply: Notice of contention

17. The SSOU carried with it such a predictable risk and hazard that the hazard "has to be managed in an active way: TJ, [403], [405], [564], [576].

18. The 13 "evident signs" were such that, by reason of the events preceding, and on, 29 August 2011, the kind of harm to the appellant was reasonably foreseeable: TJ, [567], [578], [620]; CA, [74]-[75], [77]-[82].

The fact that the psychiatric injury resulted does not mean that the trial judge engaged in "litigious hindsight" reasoning: TJ, [598] (referring to her earlier expressions of hypervigilance, the April 2011 Memo and her changes in demeanour); CA, [83].

20. The signs that were observed by the respondent related to, and were inextricably linked with, the appellant's employment, by reason of what the respondent knew as to the risk of psychiatric injury and vicarious trauma for this employee, and her co-employees.

- TJ, [69], [189], [569] (increasing workload), [70], [573] (excessive after hours work), [115], [203], [206] (affected her as a mother), [190] (Lim file), [238]-[239] (signs in memo), [244]-[245] (alert to paedophiles), [256]-[266], [583] (appellant not coping), [572] (high proportion of child sex cases), [598], [606] (behaviour out of character and abnormal), [671] (two weeks' sick leave).

21. This is a case where the evident signs – or "red flags" – were so obvious that the question of regard for the human dignity, autonomy and privacy of an employee simply do not arise.

- *State of New South Wales v Briggs* (2016) 95 NSWLR 467 at 496 [28].
- cf. *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81-919 at [45].

Dated: 2 December 2021.

J T Rush **J B Richards** **A M Dinelli** **G D Taylor**