PARTIES:	NEPI, Erminio v THE NORTHERN TERRITORY OF AUSTRALIA AND EBATERINTJA, Brendan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	79 of 1996
DELIVERED:	ALICE SPRINGS, 2 May 1997
HEARING DATES:	17 April 1997
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Appeal - General principles - In general and right of appeal - When appeal lies - Error of law or error of fact - Appeal from finding that witness not qualified to give expert opinion - Rejection of opinion not based on evidence before court - Whether witness qualified to give expert evidence a question of fact - Error of law because no evidence to support finding, or irrelevant material taken into account.

Local Court Act (NT) 1989, ss19 & 19(6)
Crimes (Victims Assistance) Act (NT) 1982

Clark v Ryan (1960) 103 CLR 486 at 503, referred to.
Klimoski v The Water Authority of Western Australia (1989) 5 SR (WA) 148, distinguished.
Peisley v R (1990) 54 A Crim R 53, distinguished.
Whitbread (1995) 78 A Crim R 452 at 460, discussed.

REPRESENTATION:

Counsel:

Appellant:	Mr G Algie
First Respondent:	Mr M Grant
Second Respondent:	No appearance

Solicitors:

Appellant:	Morgan Buckley
First Respondent:	Solicitor for the Northern Territory
Second Respondent:	No appearance

Judgment category classification:	B
Judgment ID Number:	mar97017
Number of pages:	7

mar97017

IN THE SUPREME COURT
OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT ALICE SPRINGS

No. 79 of 1996

BETWEEN:

ERMINIO NEPI
Appellant

AND:

THE NORTHERN TERRITORY OF AUSTRALIA
First Respondent

AND

BRENDAN EBATERINTJA
Second Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 2 May 1997)

This appeal arises under s19 of the *Local Court Act* (NT) 1989 and, as argued, alleges error of law on the part of the learned Magistrate in a ruling that a psychologist, Mr Tyrrell, was not permitted to express his opinion that the applicant, who had applied for an assistance certificate under the *Crimes*

(Victims Assistance) Act (NT) 1982, was afflicted by post-traumatic stress syndrome (PTSD). A further ground of appeal alleges that the damages awarded of $15,000, irrespective of whether PTSD was found, was manifestly inadequate.

The right of appeal is limited to a question of law, and after hearing the appeal, this Court may make such order as it thinks fit, including an order remitting the case for rehearing to the Court with or without directions on the law (s19(6)).

The applicant applied for the certificate consequent upon his being assaulted with a steel bar, a chair and being kicked whilst on the ground. The injuries for which the assistance certificate was sought included lacerations, contusions, bruising and swelling to various parts of his body and dislocation of the left crania cervicular joint. In addition, the application incorporated a claim for "mental distress" with particulars to be provided. Whether mental distress as particularised, PTSD, amounts to "injury" within the definition in the Act was not an issue.

The error is said to have arisen upon Mr Tyrrell's opinion that the symptoms related to him by the appellant combined to meet the diagnostic criteria for PTSD as per the American Psychiatric Association Diagnostic and Statistical Manual for Mental Disorders (DSM IV). Mr Tyrrell had

interviewed the appellant on two occasions using both structured (Horowitz Impact of Events Scale) and unstructured techniques and a draft of the report for discussion at the second meeting. As to his qualifications, Mr Tyrrell gave his occupation as a clinical psychologist with academic qualifications, including Master of Science in Psychology. He is a member of related professional colleges. The whole of his work experience commencing in 1969 has been in the field of psychology in Australia, Scotland and New Guinea, including in senior government positions. At times, his work involved recruitment of psychiatrists, and he established an acute psychiatric unit at the Tamworth Base Hospital. In 1986 he became the Regional Director of Health Services in Central Australia and entered upon private practice in about 1991. In his evidence he referred to PTSD as described in DSM IV as:

> "... a condition which is a collection of behavioural, psychological and sometimes emotional symptoms which follow critical incidents which have stripped a person of their normal resources to cope".

In anticipation of what was to follow he said, in examination-in-chief, that DSM IV was not concerned only with psychiatry, but covered a range of mental disorders. As to his experience of PTSD in particular, he referred to work such as referral from the Department of Veterans Affairs of Vietnam veterans, prisoners and children and others "referred through various channels who are suffering from various traumatic events ...". Asked whether he considered himself able to diagnose PTSD, he affirmed the fact and said he

did so frequently. "The task is to identify and isolate the post-traumatic stress disorder from other underlying conditions if they exist and be careful not to confuse them". He spoke of identifying problems which were psychiatric or general medical. He was cross-examined on a number of topics which do not require further consideration. However, counsel for the respondent asked: "I've seen post-traumatic stress disorder defined as a psychiatric condition. You would refute that, is that right?" Mr Tyrrell responded that he would and in the course of a lengthy answer said: "There are many blurred boundaries and the distinction between psychiatric and psychological is becoming less and less meaningful". Other answers were based upon that premise.

No other evidence as to PTSD was called by either side, and in particular there was no evidence from the respondent which sought to establish that Mr Tyrrell was not competent to give the opinion.

In his reasons, dealing with this topic, his Worship went directly to the admissibility of the opinion of a psychologist in what he described as "similar circumstances" and referred to *Klimoski v The Water Authority of Western Australia* (1989) 5 S.R. (WA) 148 and *Peisley v R* (1990) 54 A Crim R 53 and concluded:

> "With respect, I also adopt the reasoning of their Honours in each of the two cases referred to above. Mr Tyrrell has also crossed the barrier of expertise. His conclusions were also of the nature of a medical diagnosis.

I reject his conclusion that the applicant is suffering from post-traumatic stress disorder".

His Worship did not advert to Mr Tyrrell's evidence as to his academic qualifications and experience, nor his evidence regarding whether PTSD was a psychological or psychiatric disorder. Nor did his Worship reject what the witness had said because of some advantage he had arising from his having seen and heard him in the witness box. In short, he did not reject the opinion upon the basis of the evidence before him. Rather, he made the ruling by adopting observations made in a couple of reported cases in other jurisdictions at other times going to other mental disorders. In *Klimoski*, decided in 1989, the disorder was "post-concussion syndrome" and in *Peisley* the evidence of the clinical psychologist was offered without proper tests and based upon an incomplete history. Wood J. added obiter comment as to the importance of clinical psychologists not crossing the barrier in their expertise, a phrase adopted by his Worship. There was no question in this case that there was any lack of testing or that the history given by the applicant was incomplete. Certainly his Worship did not rely upon any evidence to that effect. Further, had his Worship's attention been directed to other cases, he would have seen that the opinions of clinical psychologists as to PTSD had been frequently received and acted upon by the courts. This Court has had the benefit of reference to some unreported cases demonstrating that proposition, for example *Enright v Windley*, Supreme Court of the Australian Capital Territory, 1 June 1995, *W & W v R & G*, Family Court of Australia, 21 April 1994,

Caldwell v Caldwell, Court of Appeal of New South Wales, 30 August 1996 and *Milner v ACT*, Supreme Court of the ACT, 15 December 1994. The most prominent and recent case dealing with the difficulties which can sometimes arise as between psychology and psychiatry is *Whitbread* (1995) 78 A Crim R 452, where the view was expressed that once the question of medical treatment of mental illness is put to one side, there is no reason why a psychologist may not be just as qualified, or better qualified, than a psychiatrist to express opinions about mental states and processes, per Hampel J. at p460.

It is clear that the decision of the trial Judge or Magistrate that a witness is qualified to give expert evidence is very much a question of fact. *Clark v Ryan* (1960) 103 CLR 486 per Menzies J. at 503; see also *R v Duncan* [1969] 2 NSWR 675 at 678, *R v Van Beelen* (1973) 4 SASR 353 at 392 and *Murphy v R* (1989) 167 CLR 94 at 122. However, it is argued by the appellant that here there was an error of law inherent in the process of making the finding.

That error arose because his Worship made the finding that Mr Tyrrell had crossed the barrier of his expertise, where there was no evidence to support it, or, because he took into account irrelevant material, the observations in the cases. I agree that either way his Worship erred in law in making the finding. The appeal is allowed on this ground.

As to the appeal against quantum, it is difficult to know just what effect a proper evaluation of Mr Tyrrell's opinion would have had had it been taken into account. His Worship said in his reasons that he allowed for mental distress as detailed in the evidence, but there may be more to that if PTSD is taken into account.

The better course is to remit the matter to the Court to reconsider the matter in the light of this ruling, including as to the quantum of damages.
