

CORAM: LEE, J.

1st October, 1986

OPARA

v

NEW SOUTH WALES MEDICAL BOARD

JUDGMENT

THIS HONOUR: The plaintiff appeals under s 23C of the Medical Practitioners Act, 1938 (as amended) against the determination of the New South Wales Medical Board on the 5th June, 1985 refusing to register him as a medical practitioner. The Medical Practitioners Act s 5 establishes the New South Wales Medical Board and empowers it to register practitioners in accordance with the provisions of the Act (s 21).

The appeal provided for by s 23C in my view, is not limited to questions of law, as counsel for the Board contended, but is a full appeal at which the parties are entitled to put before the Court evidence which was not before the Board. The present appeal is an appeal under s 23C(i) (a). This conclusion is founded upon s 23C(3) which provides:

"(3) With respect to an appeal made under subsection (1) against a determination of the Board, the Supreme Court may, having regard to the merits of the case and the public welfare -

- (a) dismiss the appeal; or
- (b) order that the determination of the Board be revoked and be replaced by a different determination made by the Court and specified in the order,

and may make such further orders ancillary to its dismissal of an appeal under paragraph (a) of any order made under paragraph (b), as it thinks proper."

The reference to the "merits of the case and the public welfare" clearly places upon this Court the responsibility for a decision as to whether an applicant who has been denied registration should be entitled to practise. This conclusion is in no way inconsistent with the reference, in sub-s (2), to "a re-hearing" (Dare v. Dietrick (1979) 26 C.L.R. 19; Keppie v. Law Society (1962) 62 A.C.T.R. 9 at 15; Clarke & Walker Pty. L...td. v. Secretary, Department of Industrial Relations & Anor. (C.A. (unreported) 19/12/1985). So far as the approach to the present appeal is concerned, I adopt with respect the observation of Smith, J. in Georgoussis v. Medical Board of Victoria (1957) V.R. 671 at 679:

"No doubt the Court must know what application was made to the Board and what the Board's decision was, in order that the Court may perform its own function and frame its own order. And where medical questions are involved the Court, if it in fact has the Board's opinion placed before it, will naturally attach great weight to that opinion as it will to the Board's views on credibility if the evidence given before the Board happens to be used upon the appeal."

Although it will be necessary later to examine closely the provisions of the Medical Practitioners' Act, 1938, it is appropriate here to make brief reference to the scheme of registration established by the Act in order that the significance of the evidence given, to which I am about to refer, may be understood. The Act was amended by Act No. 55 of 1981, and the amendments relevant to registration came into force on 27th January 1982.

The Act provides for two substantial categories of registration - full entitlement to registration under s 15 and limited entitlement to registration under s 16. Section 15 applies to persons graduating from the University of Sydney, University of

New South Wales, the University of Newcastle and also to persons who graduate from universities referred to in Column 1 of Schedule 1 and have qualifications as set out in Column 2. The universities specified are those in other States of the Commonwealth as well as certain universities in the United Kingdom, Ireland and New Zealand. Persons from those universities, to be qualified for registration must, in addition to the prescribed degree have the prescribed experience, adequate knowledge of English and satisfy the Board of good character (s 15(1)(b) and (c)), but there is no requirement that they pass any additional examination - their degree is sufficient in that regard.

Registration under s 16 is available to those who hold degrees or diplomas from Schools of Medicine not being those set out in Column 1 of Schedule 1. An applicant is entitled to registration if he:

- "(c) (i) has obtained results satisfactory to the Board in the prescribed examinations; or
- (ii) satisfies the Board that he should not, for the purpose of his being entitled to be so registered, be required to be so examined or should not be required to obtain those results;"

and in addition has the required domicile (unless the Board decides otherwise) (d); a knowledge of English adequate for the practise of medicine in New South Wales (e); the prescribed experience within the meaning of s 15(1)(b) (f); and good character to the satisfaction of the Board (g). In the present case it is only the requirement set out in paragraph (c) which requires consideration, as it is common ground between the parties that the plaintiff satisfies all other requirements of the Section. The plaintiff has not passed the prescribed

examination and claims that he should not be required to be so examined or obtain satisfactory results as stipulated.

The plaintiff is a Polish citizen who arrived in Australia on 19th January 1980. He had attended Lodz University from 1967 to 1974 when he graduated in medicine. He thereafter served for a year as an intern at Main Military Hospital, Warsaw and on 23rd September received a Certificate of Registration as a medical practitioner in Poland. He then served as a Resident Medical Officer at the same hospital, during which he spent four terms each of ten weeks duration in surgery, medicine, obstetrics and gynaecology, and anaesthetics. In June 1976 he was appointed a Registrar in Anaesthetics at the State Clinical Hospital, Warsaw. He sat for and passed a final examination in anaesthetics in June, 1979. During his training he was able to leave Poland and work in other countries as a medical practitioner. He worked as a Resident Medical Officer in anaesthetics at Malmo Hospital, Sweden in June and July 1975, and in a like position at Nacka Hospital, Sweden in June 1977. In June and July 1978 he worked as Relieving Medical Officer at Dusseldorf Hospital in Dusseldorf, West Germany. In August 1979 he left Poland and worked as Anaesthetics Registrar at Academica Hospital, Vienna, Austria until January 1980 when he came to Australia.

At the time he arrived in Australia, the Medical Practitioners Act, 1938 had different provisions in regard to registration from those now operating. In particular, so far as the present case is concerned, a person such as the plaintiff, who had obtained his degree in medicine in Poland and not in one of the universities referred to in the Schedule to the Act as it then stood,

was required to pass examinations - 4th, 5th and final year as prescribed by University of Sydney or University of New South Wales (s 17(1)(c) and (3)) or hold a Certificate of Registration for post graduate teaching tuition or research for three years, or a Certificate of Regional Registration (s 17(1)(d)). Provision was made for a graduate from a School of Medicine outside of New South Wales to be relieved of any of the requirements of sub-s(1) of s 17 if the Board was of the opinion "that such person has such special qualifications and has had such special experience in the practise of medicine or surgery or of any branch of medicine or surgery as would justify waiving compliance with the requirements of sub-s(1) of this section and decides that such requirements be waived in relation to such person" (s 17(2)). A further provision, which would seem to have much the same effect, was to be found in sub-s 2A(c), namely that a person who had obtained a degree or diploma in a country outside New South Wales might be relieved by the Board of the obligation to attend the courses and pass the examinations referred to in (c)(3) of sub-s(1) if "the Board is of the opinion that such person by virtue of his qualifications and experience in the practise of medicine or surgery or any branch of medicine or surgery should not be required to attend the courses or pass the examinations".

Section 21 of the Act as it then stood provided that the Board might, at the request of an institution or organisation interested in post-graduate teaching, grant to any person a Certificate of Registration for the purpose of teaching, or receiving tuition or engaging in research for a period of one year

When the plaintiff arrived in Australia he first worked as a medical observer at Sydney Hospital where his duties were essentially

those of Resident Medical Officer, involving work in Casualty and in the Intensive Care Ward, and then having been certified under s 21 to undertake post-graduate tuition at The Broken Hill and District Hospital, he carried on as a Resident Medical Officer there from 14th July 1980 until 12th January 1981. In January 1981, he commenced post-graduate tuition pursuant to s 21 at The Parramatta Hospital, an undertaking being given by the Assistant Director of Medical Services at that hospital that his services would only be used in accordance with the conditions required under s 21 of the Act, i.e; post-graduate tuition. It appears from the evidence however, that the plaintiff carried on the normal duties of a Resident Medical Officer and was involved in virtually all fields of medicine whilst at Parramatta Hospital. The evidence shows that he was rostered as the Senior Resident Medical officer on many occasions and that his responsibility included admissions through Casualty and acting as Resident Medical Officer in the Orthopaedic, Medical and Surgical Departments. He worked under the supervision of a number of specialists in various fields of medicine and I shall refer a little later to their views as to his competence. In these proceedings great reliance has been placed upon the recommendations and opinions of these doctors.

In January 1981, he attended a course in Obstetrics and Gynaecology and in August acted as observer at the Women's Hospital, Crown Street. During this time, as I have said, he was registered under s 21 of the Act, and in order to receive full registration he was required, as earlier mentioned, to pass an examination. He sat for this examination, known as the Australian Medical Examining Council

examination, (A.M.E.C.) in September 1981, but he did not pass. (I mention here, that this examination does not appear to accord with the examination stipulated in s 17(c)(iii) of the Act as it stood at that time, but nothing turns on that so far as the present appeal is concerned.) The A.M.E.C. examinations became the "prescribed examinations" for the purpose of s 16(c) of the Act in its present form from the 29th January, 1981. (Medical Practitioners Regulations, 1981-Reg. 14.) This examination consists of three sections, one a test in English the second a test in the whole spectrum of medicine - medicine, paediatrics, psychiatry, surgery and obstetrics and gynaecology, and, if these papers are passed, a test designed to assess the applicant's clinical knowledge and ability. The examinations in medicine and English are framed as multiple choice examinations, that is, a series of propositions is stated, only one of which can be correct and the student is required to indicate which is. The level of the knowledge required to pass the medicine examination is equated as far as possible to that level of knowledge expected of a student at his final examinations at a university in this country. Doctor Amos the President of the defendant Board, who gave evidence before me described the purpose of the examination in his affidavit in this way:

"It is designed to satisfy the examiners that the candidate has attained the same standard as a Graduate of an Australian medical School and is competent to practise as a medical practitioner in Australia "

The evidence shows that it is searching test yet of necessity, of course, it can still only deal with a fraction of the whole

content of the various subject matters which it encompasses. There are in all 150 questions in the paper. Between 1978 and 1985, 845 candidates sat for the examination, i.e.; about 100 foreign doctors each year - 543 passed.

The plaintiff passed the examination in English but in the general medicine examination he received a mark of 76 out of 150, the pass being 70 per cent, and this placed him in the lower 13 per cent percentile of candidates. The following sets out the marks scored by the 103 candidates who sat for the examination:

55 scored 105 or better,
24 scored 90 - 104
11 scored 80 - 89
5 scored 70 - 79
8 scored less than 70

The plaintiff's examination paper, with the marks given, was produced to the Court, and against the subject "English" is placed the word "Weak (Pass)" and the following marks are shown as having been allotted to the sections of the examination testing general medical knowledge; "Medicine 39, surgery 26, obstetrics and gynaecology 11 Total 76. Fail". The highest mark gained by any student was 136, and the lowest 51. The plaintiff's explanation of his failure was that he was not prepared for the multiple choice examination. (It appears that if he had made enquiries about the nature of the examination he would have been given fairly detailed and helpful information.)

By letter dated 22nd October 1981, the plaintiff applied to the Board to have the medical qualifications given to him in Poland recognised, and seeking to be registered as a medical practitioner without conditions. In support of that application he provided a curriculum vitae together with supporting

testimonials of medical practitioners with whom he had worked at Parramatta Hospital. I set out now the substance of their opinions of the plaintiff. "I regard Dr Opara as better informed than most foreign medical graduates who were registered prior to changes in the Act ... It is my considered opinion that he is worthy of full registration and if this is not possible that special arrangements in regard to continued employment in a hospital be made so that he might have a better chance in the examination" (Dr Cable, medical Superintendent). "Dr Opara is a man of outstanding character ... He is dedicated to the practise of medicine ... and is an untiring worker. His clinical judgment is excellent." (Dr Coren, Visiting Oral Surgeon.) "I am very happy to support him in any application he may make for registration, and for any employment he may seek" (Dr Johnson, Clinical Surgical Superintendent and Staff specialist Surgeon).

"... his clinical judgments were mature and sound... I have no hesitation in recommending him as a fully qualified and registered colleague" (Dr Szabo Visiting Surgeon). "I feel he would make a very real contribution to medical practise in this country, and would strongly support his application for registration". (Dr P.J. McGrath - I should mention that Dr McGrath gave evidence before me and stated that he did not consider it unreasonable that Dr Opara should be asked to pass the examination.) "He is quite a capable physician with an adequate knowledge of medicine and I would support his claim for full medical registration with the New South Wales Medical Board." (Dr Despas Visiting Thoracic Physician) "I would consider him to be sufficiently trained for full registration in New mouth Wales" (Dr Lorentz, Consultant Neurologist)

"He has assisted me in routine orthopaedic surgical procedures and in that regard my comments are entirely favourable". (Dr Collins Greaves, Consultant Orthopaedic Surgeon) "I have no hesitation in recommending him for permanent registration in this country and for any position in medicine for which he might apply". (Dr Waugh, Consultant Physician) "From my experience of associating with graduates from overseas, I would say that Dr Opara is certainly superior to the great majority of them, both in terms of his personality, his aptitude, his knowledge of the English language and his knowledge of medicine". (Dr Skyring, Visiting Physician) "I am happy to support him in his application for registration with the Board of New south Wales". (Dr Maher, Visiting Urologist) "Dr Opara impressed me from the start not only with his above average medical ability but also with his rapid and accurate assessment of a situation". (Dr Older, Director of Intensive Care). I would mention here that of this group of practitioners, Drs Johnson, Lorentz, McGrath, Waugh and Coren also gave evidence on his behalf before the Enquiry under s 19 of the Act held on 27th July, 1982 to which I will later refer. Dr Craig also supported him. These same gentlemen (and also Dr Gooley and Dr Szabo) came before the Court and gave evidence substantially to the effect of the opinions they had expressed before the Board.

As amendments to the Act in regard to registration were to become operative on 27th January, 1982, the plaintiff's application of 22nd October, 1981 can be regarded as having been overtaken by events and in fact the plaintiff never did receive any acknowledgement of it, although it was discussed between him and the Secretary of the Board. His evidence is that the Secretary at the time, Mrs Robertson, gave him

to understand that when the amendments to the Medical Practitioners Act, 198 came into force in January he would be favourably considered for registration without the need to pass the examination.

As Parramatta Hospital was destined to close at the end of 1981, the plaintiff sought a transfer of his registration under s 21 to Westmead Hospital and this was granted although he did not go there. To complete the picture, it can be said here that after leaving Parramatta Hospital in January 1982, the plaintiff remained unregistered and did not work until he was registered under s 21 for post-graduate tuition in Prince of Wales Hospital, and he worked there and at Bankstown hospital from August 1982 until late January 1983 when he entered private practice. he remained in private practice believing he was registered so to do, until the end of 1984.

Let me return to events in January, 1982. There then occurred the first of a number of events which ultimately led both parties into a state of confusion. The evidence shows that on 15th January 1982, the Secretary of the Board advised the plaintiff by letter that his Certificate of Registration pursuant to s 21 would cease to have effect on 27 January 1982 when amendments to the Act were to take effect. He was advised that it would be necessary for him to apply for registration under the provisions of the newly amended s 16 and his registration pursuant to s 21 was extended to 27th January 1982. This letter was sent to the plaintiff at an address in Hunters Hill which was not the plaintiff's address and of which the plaintiff had never heard,

and he never received it. The explanation given by the then Secretary, Mrs Robertson was that the plaintiff's address was not known and the letter was sent to the address of Dr Maher who had supplied the plaintiff with a reference supporting his application for registration. It is also to be mentioned that it appears from the Minutes that the actual Resolution of the Board made at that time was that the plaintiff should have s 21 registration for post-graduate tuition for the period of twelve months from 11th January 1982, but this information was never communicated to him. On 22nd January the plaintiff made application on the form prescribed by the Board for unqualified registration under s 16 of the Act. The application was accompanied by letters confirming his qualification as a general practitioner in Poland. The amendments to the Act became effective 27th January 1982 as I have said. On 3rd March, the Board considered this application and resolved that it be declined, and the plaintiff was advised of this by letter on 8th March. The letter in part reads "I have to advise that the Board declined your application on the basis that your qualifications did not fulfil the requirements of the Medical Practitioners Act. It was also considered that your qualifications and experience were not of a standard that would entitle the Board to waive the prescribed examination requirements and therefore allow them to grant you registration under s 21(3) to practise in a limited field of medicine". The letter then went on to state that the passing of the examination would be necessary in order to obtain registration. There then followed correspondence between the plaintiff's solicitors Messrs Dawson Waldron and the Board, which stressed (inter alia) that the plaintiff whilst at Parramatta

Hospital had treated some 600 patients without being under supervision, and it is sufficient to say that in the result the Board agreed to receive further material to be put forward by the plaintiff in regard to his registration. On 2nd June 1982, the Board considered in detail the position of persons who had been registered pursuant to s 21 prior to the amendments of the Act, and it approved certain guidelines. The minutes of that date show the following:

"Registration of Previous Section 21 Certificate Holders

1. Before the Medical Practitioners Act was amended in 1981, registration was possible under Section 21. The Section has now been deleted. This Section allowed a hospital to apply to the Board for registration for a doctor for purposes of post graduate teaching, training or research. In late 1980, the Board was faced with a large number of applications for new, and for renewal of, Section 21 Certificates. When this was investigated, it became clear that a number of hospitals were using Section 21 Certificates to obtain registration for doctors not otherwise entitled to registration. It also became clear these doctors were being used as resident medical officers as work force to help run the hospitals, and that they were receiving a very variable amount of post graduate teaching..
2. The Board then interviewed all doctors holding Section 21 Certificates and either -
 1. Granted some full registration.
 2. Renewed the Section 21 Certificate if -
 - (a) the doctors were receiving adequate post graduate tuition;
 - (b) were working under supervision so that the interests of the safety of the public were protected.
3. Rescinded the Section 21 Certificates if -
 - (a) post graduate tuition was inadequate; (b) supervision was inadequate;
 - (c) reports revealed the doctors to be lacking in competence.

3. When the Act was amended in 1981, those doctors who hold valid Section 21 Certificates were granted limited registration under Section 16 until their situation could be reviewed. (I have already said that Dr Opara was granted registration to 11th January 1983 by Resolution of the Board on 27th January 1982 but this was not communicated to him.)
4. So that consistent decisions could be made affecting the future registration of doctors who had held Section 21 Certificates, the Board adopted the following guidelines:
 - A. No-one can be registered who has failed the A.M.E.C. examination three times.
 - B. No-one can be granted limited registration who has not previously worked in New South Wales unless they are genuine post-graduate teachers or students or worked solely in research.
 - C. Previous Section 21 Certificate holders
 - (i) may be granted limited registration to work in junior hospital posts under supervision in hospitals approved by the Board.
 - (ii) this registration be limited in time for 2 years maximum to permit them time to gain A.M.E.C.
 - (iii) it be emphasised to the successful applicant and the employing hospital that this registration is for a transitional period and will cease on 30 June 1984.
 - D. Application for limited registration under Section 16 to prepare for A.M.E.C. will be declined to those who have not previously held a Section 21 Certificate.
 - E. Application for conditional registration to obtain internship experience to be able to sit A.M.E.C. will be declined. This rule will also strictly apply to Australian citizens graduating from overseas universities not on Schedule One.

It was resolved that the Board approve in the terms of the above guidelines the registration of the following previous Section 21 Certificate holders."

The effect of the above may be stated to be that those registered under s 21 of the Act before its amendment in 1981 were given limited registration until 30th June, 1984. At the same meeting the plaintiff was granted registration to work in a hospital to 30th June, 1984 and was advised of this by letter of 8th June. This registration was registration under s 16(2) and s 21 of the amended Act - that is to say the plaintiff had not passed the A.M.E.C. examination but the Board decided that it would give him registration notwithstanding, but conditional registration only.

The letter of 8th June 1982 resulted in a protest from the plaintiff's solicitors and in the result an enquiry under s 19 of the Act was held on 27th July 1992. The plaintiff was represented by counsel and gave evidence. He called witnesses to support his claim for registration namely, Dr Johnson, Dr Lorentz, Dr Coren, Dr Craig and Dr McGrath all of whom had supervised him in Parramatta Hospital as I have earlier stated. (The Board also had the references supplied by the other doctors to whom I have previously referred). Each of them, except Dr Coren and Dr Craig whose affidavits were read, has given evidence before me and that evidence is impressive as to the plaintiff's competence at Parramatta Hospital in 1981. In addition, three other specialists under whom he worked at Parramatta Hospital Dr Older, neurologist, Dr Szabo, general surgeon, and Dr Waugh, Physician, came before me to add to the list of those who considered that the plaintiff was entitled to full registration.

On 1st September, 1982 the Board gave its decision and the plaintiff and his solicitor were present at the time. The decision is set out in the Minutes of the Board of 1st September (Annexure P to the affidavit of S.J. Gardner, Secretary of the Board). The decision of the Board was that the plaintiff be as already granted and under the

conditions already imposed by the Board, i.e. as an intern in a hospital until 30th June 1984. In its decision the Board stated as follows:

"Full registration under Section 16 as distinct from registration with restriction to practise along the lines already authorised by the Board devolves on two requirements.

1. Whether he is able to pass the prescribed examination.
2. Whether the Board can be persuaded that he should not be required to pass the examination.
3. In considering these requirements due weight must be given to the fact that he has already sat for the examination once and failed.

One of the purposes of the changes in the Medical Practitioners Act effected by the Medical Practitioners (Amendment) Act 1981 was to rectify the pre-existing disparity in the requirements for registration for graduates from Australian Medical Schools and those from Overseas University Medical Schools. It was considered that the Medical Schools from Great Britain, Ireland and New Zealand had Courses and examination requirements of similar standards to those required by Australian University Medical Schools.

Medical Schools from other countries were of a standard unknown to Australian Medical Board and Councils. The decision of Government was that applicants for registration from Overseas Medical schools, not being on Schedule One of the Medical Practitioners Act, should be required to sit for an examination. This avoided any discrimination between other Medical Schools and countries in which Courses were held and from, which applicants graduated.

The deciding requirement was the standard and capacity of the individual and not that of the school of origin.

Section 16(c)(ii) was incorporated in the Act to provide for registration without examination of doctors of renown and accomplishment who were undoubtedly in the Board's opinion, of such standing that they should not be required to sit for the examination. These included for the most part,

visiting professors, particularly those in post-graduate teaching, doctors of outstanding attainments coming to Australia under the exchange programmes of some of the larger hospitals, guest professors and the like. Dr Opara did not have attainments of this nature and calibre.

Another reason for Section 16(c)(ii) was that it could be used by the Board to grant registration to practise (without passing the prescribed examination) under conditions limited in duration and in conditions relating to practising medicine (Section 21(3) where the Board felt after conducting the inquiry, this could be compatible with public safety. The Medical Board has already exercised its discretion under the Act in Dr Opara's favour to this extent.

The decision of the Board is that Dr. Opara be granted registration to practise medicine in New South Wales only as already granted and under the conditions already imposed by the Board. His application for full registration is not approved by the Board."

It will be seen that the Board decided that the examination would only be waived in the case of eminent persons as set out there and cases of limited registration such as Dr Opara's case. In his affidavit sworn on 14 March 1986, Dr Amos put it this way "In my experience the discretion referred to in s 16(c)(ii) of the Medical Practitioners Act is rarely exercised and then only in cases where the applicant is an outstanding and pre-eminent medical practitioner or seeking to gain post graduate experience in Australia, after which the applicant undertakes to return to his own country". In his evidence, (p 207) Dr Amos also referred to the case of registration of specialists of undoubted high standard for specialist practise in a particular area or hospital. There were those three categories of persons just mentioned which according to the evidence would be relieved of the examination referred to in s 16. I should mention that the Board at the enquiry comprised:

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| Dr Tomlinson | - President of the Board and a distinguished surgeon |
| Professor Rafael | - Professor of Psychiatry at Newcastle |
| Dr Peter Grieve | - Secretary-General of the Royal Australian College of General Practitioners and a general practitioner of high repute. |
| Dr Hinde | - Specialist Obstetrician at Royal Prince Alfred |

	Hospital.
Dr Booth	- Specialist Radiologist
Dr D. Cohen	- Cardiothoracic surgeon
Dr M. Benanzio	- Specialist orthopaedix surgeon

The position thus arrived at was that the Board, comprising practitioners from many fields of medicine, after a full enquiry and, notwithstanding the evidence called by the plaintiff, was not disposed to exercise its discretion to relieve him of the requirement of passing the prescribed examination in order to obtain full registration. Although the plaintiff was present when the decision was given and was aware of it, the written notification to him of the Board's decision contained in a letter dated 1st September 1982 was never received by him, because it was, again, posted to the address 10 Wybalena Road, Hunters Hill. The evidence shows, as I have said, that this address was the address of one of the practitioners Dr Maher, whose reference had been used by the plaintiff when he first applied for full registration. That letter attached a certificate certifying that the plaintiff was entitled to practise in a hospital in an appointment granted by the Intern Placement Committee until 30 June 1984. The fact that the plaintiff never did see that Certificate and had only seen the Certificate granted in respect of his post-graduate tuition at Broken Hill District Hospital - this in no way resembled "the Authority to Practise" to which I am about to refer - has some bearing upon the events which happened subsequently. In September, 1982, the plaintiff received a form under the heading "New South Wales Medical Board Authority to Practise as a Registered Practitioner until 30th September 1983". The bottom portion of the document and the back of it requested certain information to be filled in for statistical purposes in regard to the plaintiff's work and its nature. It required the payment of a fee of \$70 "for the retention of your name on the register" by 30 September 1982 and stated "if you fail to pay the retention fee by that date your name will be removed from the Register".

The plaintiff immediately paid the required \$70. The top half of the document showing the imprint of the cash register and containing the information just mentioned was handed back to the plaintiff. The "Authority to practise" was in fact intended to be but a receipt for the annual registration fee, which must be paid by all registered medical practitioners (s 24) and no explanation has been offered as to why the Board gave the receipt the high-sounding title which it did. The evidence is clear that the plaintiff resigned from the Prince of Wales Hospital at the end of January and entered practice as a general practitioner in February/March, 1983 firstly, as an employee of Australia Wide Locum Service, then later as an employee of Western Medical Services Pty Ltd who conducted a radio service practice, and ultimately as an employee of Metropolitan Medical Services. A little later he went into private practice with a Dr Balin at 107 Pitt Street, Sydney at the same time however, working a number of days for Metropolitan Medical Services. He and Dr Balin expended about \$15,000 in setting up their practice.

Altogether he was engaged in practice from February/March 1983 to December 1984. During the period he was in general practice the treatment which he says was afforded by him to his patients covered:- gynaecological and obstetrics; paediatrics diagnosis and treatment; minor cosmetic; orthopaedic and general surgery; cardiology and psychology diagnosis and assessment, general diagnosis referring to specialists where appropriate and appropriate medical prescribing.

In the year 1983, the plaintiff had received another "Authority to Practise" and again paid the required fee. In September, 1984 he received a document headed 'New South Wales Medical Board - Renewal of Registration as a Registered Medical Practitioner until 30th September, 1985'. Again he paid the registration fee and was handed back the renewal with the imprint of the cash register on it.

The evidence of the plaintiff is that whilst in general practice he acted as locum for a number of general practitioners during their absence on holidays or for other purposes, and that he treated their patients and that he received no complaints. He says he was offered a partnership by two of the medical practitioners. His evidence is that with Western Medical Services Pty Ltd he attended patients of the service each day and an affidavit by Mrs Draper the manageress of the Company shows a daily attendance on patients averaging about 10-12 per day. Mrs Draper said no complaints were made.

His employment with Metropolitan Medical Services has been the subject of not only his own evidence, but evidence given by Dr Gooley who was the senior medical practitioner in the practice "conducted" by that Company, and in charge of the Doctors employed by it. Dr Gooley explained that the plaintiff was in the practice for something in excess of 12 months, that he worked a full time week and that he, Dr Gooley, was associated with him for about 16 hours each week.

The practice was one in which about 25 per cent of the cases were emergency cases. Dr Gooley spoke highly of the plaintiff's abilities. In his affidavit filed in the proceedings, he believed that the "Authority to Practise" authorised him to go into general practice. His claim is that on receipt of the "Authority to Practise" he thought that the Board, having refused him full registration in July 1982, had changed its mind and decided, to grant him registration. In considering this claim it is important to bear in mind that the plaintiff himself had never been personally involved in any of the previous registrations ostensibly for postgraduate tuition (the evidence strongly suggests that these were merely a convenient means of providing medical officers for hospitals) and that the statement on the form itself "Authority to Practise" was understood by him to mean what it said. The "Authority" did not indicate that the registration was in any way conditional. The plaintiff had never previously been asked to pay a fee for any Certificate or Registration, as I have said. The undoubted fact however, is that he openly practised as a general practitioner for a period of approximately two years until the end of 1984.

The question whether the plaintiff bona fide believed that he was fully registered as a medical practitioner or whether he merely took advantage of the words "Authority to Practise" to put forward a claim that he took that view, has been hotly debated before me, but having considered

all the evidence in the case, I am of the opinion that the plaintiff has established, on the probabilities, that he did bona fide believe that he was entitled to go into private practice. It may well be that there was an over-willingness on his part to treat the document as entitling him to go into private practice, but, the evidence as to his character, and the fact that the "Authority to Practise" was used, he said "At all times he displayed general care, skill and expertise equal to or about that displayed by the average Australian graduate". In his evidence he said that whilst the plaintiff worked in the practice there were six to ten other medical practitioners³

In tests (English knowledge and medical knowledge). I shall refer again later to Dr Gooley's evidence. It has another significance in the case in that the "Authority to Practise" which the plaintiff had obtained first in 1982 and then again in 1983, was the document from which Dr Gooley satisfied himself that the plaintiff was a registered medical practitioner entitled to be in general practice. I mention here that there is also evidence that the Commonwealth Department of Health at relevant times regarded the "Authority to Practise" as evidence of full registration for the purposes of the Medical Health Scheme (Ex N). The plaintiff said in his evidence that Australia Wide Locum Service treated the Authority to Practise as evidence of his being fully registered.

The plaintiff in these proceedings and also before the Board, and subsequently in the Local Court in criminal proceedings which were taken against him in 1985, persistently maintained that as Dr Gooley and others said, to authenticate his right to practice, and the fact that he acted quite openly are all consistent with him believing that he was registered unconditionally. He impressed me as a truthful man.

The Board however came to know that he was in private practice and in February 1984, two inspectors interviewed him. The evidence is that he was told that he should not be practising but he maintained that he was entitled to. He was requested to appear before the Education and Credentials Committee, which he did on 6th June, 1984. A matter involving him in forbidden advertising was quickly resolved and the evidence is that he was told he should cease practising. Once again, he insisted that he was registered and, that he was entitled to practise. According to his evidence, he was told that he would be advised of his position in writing. There is evidence that at that meeting he was shown

by either Mr Gardner or Dr Amos the letter of 1st September, 1982, addressed to the address 10 Wybalena Road, Hunters Hill, which quite clearly stated that he was only registered to 30th June 1984, but he denied this. His evidence also is that on that occasion he got the impression that Dr Amos would in fact be recommending that the Board grant him full registration and there is some support for this in the Minutes of that date, which show that the Board resolved that the Crown Solicitor be contacted for legal advice as to whether the Board could be "on shaky legal ground" in regard to the "Authority to Practise" which had been issued to him and upon which he was placing so much reliance. There is a, strong contest between the parties as to the proper interpretation to be placed upon what happened at that meeting and whether in fact the plaintiff, knowing that he did not have full registration, nonetheless thereafter wilfully persisted in carrying on his practise until December 1984.

Once again, having carefully considered the evidence of Mr Gardner, Dr Amos and Mrs Hewitt, and the evidence of the plaintiff. I am prepared to accept the plaintiff's claim that he got the impression that Dr Amos was likely to be favourable towards his claim to be entitled to be registered and to remain in practice, and that he, the plaintiff, considered he was registered.

The evidence is that on 8th June, a letter addressed to him at 183 Macquarie Street, Sydney was sent by the Board advising that if he ceased practise immediately and provided the Board with a written apology, no action would be taken. The plaintiff never had an address at 183 Macquarie Street, Sydney and again the most likely explanation of this address is that the Board not having the plaintiff's address sent it to the address: of a doctor who had given evidence for him at the enquiry in July 1982.

The next relevant event in 1984 was the posting to the plaintiff in September of the "Renewal of Registration as a Registered Medical Practitioner until 30/9/85" previously referred to, with an accompanying request to pay the fee of \$70 - which the plaintiff did. Shortly before, an employee of the Health Department, Miss Wallace, at the request of the Board, had made an appointment with the plaintiff and consulted him

professionally. On the morning of 29th November 1984, the plaintiff received a letter from the Board advising him that his registration had lapsed on 30th June, 1984 and stating "It is noted you were forwarded a roll fee notice which stated you were registered with the Medical Board until 30th September 1984. This was an oversight and in any case was not in accordance with the requirements laid down by the Board for your registration". The reference to the "roll fee notice" was intended to be a reference to the "Renewal of Registration", earlier referred to. On the same morning, Miss Wallace again attended the plaintiff's premises and consulted with him. Shortly afterwards, two of the Board's inspectors arrived and a conversation took place with the plaintiff. The plaintiff was again told that he should not be practising and he stated that he had consulted his solicitor and he was going to continue to practise. On 4th December 1984 he was arrested and charged with an offence under s 42 of the Act. The charge alleged:

"That Richard Opara between the 1st of July, 1984 and 4th December, 1984, at Sydney in the State of New South Wales, being a person not registered under the Medical Practitioners Act 37 of 1983 did take a title which having regard to the circumstances in which it was so taken, is capable of being understood to indicate or is calculated to lead persons to infer that he is registered as a medical practitioner under the said Act."

The plaintiff himself gave evidence and on 28th May, 1985 the Magistrate dismissed the charge. In January of 1985, there was correspondence between the plaintiff's solicitors and the Medical Board and in the result on 7th February, 1985 the plaintiff, through his solicitors, made application for registration. The letter pointed out that the plaintiff was impecunious and presently unemployed. A reply of 25th March stated that the Board had already held an enquiry under s 19, and it was not prepared to move from its previous decision. The letter stated that if the plaintiff passed the A.M.E.C. examinations the Board would be prepared to consider his registration. The Board plainly was continuing to implement the policy and apply the criteria for registration under s 16 expressed in its judgment of 1st September 1982 following the enquiry on 27th July 1982. On 30th May, 1985 the plaintiff lodged an application for registration on the form prescribed by the Board, and the Board on 5th June declined the application. The plaintiff,

was advised by letter of 19th June, 1985 of the decision. That letter concluded "To be eligible for registration, the Board advises as it has done previously, that you first pass the A.M.E.C. examinations". It is against this refusal that the plaintiff now appeals.

The plaintiff, I mention, has remained unregistered but he has taken a position as an administrator in a private hospital.

Before proceeding further, it is convenient to summarise the effect of the evidence insofar as it relates to the plaintiff's competence as a medical practitioner.

The plaintiff, having graduated from Lodz University, in Poland, served as a medical officer for the required period and received his certificate of registration as medical practitioner a year later. He then served as a resident medical officer and Registrar in Anaesthetics in Warsaw Hospital; he was accepted as a resident in Malmo, Sweden, and Dusseldorf, Germany. After that he worked as an anaesthetic registrar in Vienna, Austria. It can be said that the medical qualifications of these last mentioned countries are generally accepted here as being of a high standard so far as knowledge and performance are concerned. The plaintiff, from the time of his arrival in Australia in 1980, has had considerable "post-graduate tuition", but more particularly experience in all fields of medicine in his position as resident medical officer in the hospitals to which I have referred. He has undoubtedly impressed the specialists who have supervised him; and it is no doubt unusual that he should have been able to produce such impressive references in respect of his competence and manner as a doctor, and his good character. (I leave out of account at the moment the fact that he has been in practice as a medical practitioner in private practice from early 1983 until December 1984) On the other side of the coin, he failed badly in the A.M.E.C. examination in 1981 and has never sought to sit again for that examination.

Before me the plaintiff's case has been urged upon the footing that the evidence as to the plaintiff's competence as a medical practitioner is of sufficient cogency to justify a conclusion that the Board, in the exercise of its discretion, should have dispensed with the requirement of the plaintiff passing the prescribed examination. It is claimed that the Board has erred in taking the view that it can waive the requirement of the examination only in very special cases, such as those referred to in its decision of 1st September, 1982 and by Dr Amos in his evidence which I have earlier set out.

The point that counsel for the plaintiff makes is that competence and fitness to practise may be demonstrated by evidence of actual performance by the candidate for registration, and that the opinion of experienced practitioners under or with whom he works must be given great weight. The discretion given by s 16(c)(ii) to dispense with the examination is not, it is claimed, limited to cases where the candidate has outstanding qualifications, (for example, degrees, fellowships, high repute or standing in some particular department of medicine), but is available in any circumstances where the evidence put before the Board demonstrates fitness - i.e. possession of the required degree or diploma, and of the required level of knowledge, and of experience, and good character - to be registered. The Board, it is submitted, therefore erred in failing to consider whether, on the evidence placed before it at the enquiry on 27th July, 1982, the plaintiff was in fact shown to be fit to be registered, notwithstanding that he did not fall into any of the categories for exemption from passing the examination which the Board had established. The Court therefore, it is said, should intervene and consider the matter afresh, and hold that the plaintiff was entitled to registration at that time, and more so now, (for reasons I shall outline later) after he has spent two years in general practice.

In order to assess the significance of that submission, it is necessary to understand what it is that the Board should be satisfied of before it waives

compliance with the requirement of examination, and, of course, the same considerations apply to the Court in the appeal. Section 23C(3) in requiring the Court to have regard to "the merits of the case and the public welfare" is, by implication, stating the obligation which has been cast on the Board in regard to registration of medical practitioners. Section 16(c) has the consequence that unless the Board dispenses with the requirement of passing the examination referred to in (c)(i) registration cannot be granted until the examination is passed. The Board, is by the paragraph (c)(ii) given the power to dispense with compliance with (c)(i) but there is no express statement of the circumstances necessary to be shown to "satisfy" the Board that the examination pass is not required, so the ambit within which the power may be exercised, must be ascertained from an examination of the terms of the Act. This is but another way of saying that the Board - and the Court - is given a discretion to waive the examination, and that the extent of that discretion and the factors relevant to the exercise of that discretion are to be determined by reference to the purpose and provisions of the Act. The principle to be applied in determining the ambit of a discretion was stated by Dixon, C.J. in *Klein v. Domus Pty Ltd* (1963) 109 C.L.R. 467 at 473:

"This Court has in many and diverse connexions dealt with discretions which are given by legislation to bodies, sometimes judicial, sometimes administrative, without defining the grounds on which the discretion is to be exercised and in a sense this is one such case. We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case."

The factors relevant to the determination of the ambit of a discretion conferred on an administrative body and the role of the Court in reviewing the exercise of such a discretion was dealt with at length and quite recently by Mason, J in Minister for Aboriginal Affairs and Anor v. Peko-Wallsend Limited and Ors, High Court 31 July 1986 not yet reported; at pages 12 to 16 of his judgment. At page 13 he said:

"What factors a decision-maker is bound to consider in making the decision is determined by construction of the

statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard (see *Reg. v. Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1970) 144 C.L.R. 45, at r.p.49-50, adopting the earlier formulations of Dixon, J. in *Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746, at pp.757-758, and *Water Conservation and Irrigation Commission (N.S.W.) v. Browning* (1947) 74 C.L.R. 492, at p.505). By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the Court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act."

Section 16(c)(ii) makes plain that an applicant for registration bears the onus of satisfying the Board that the examination, or a pass therein, should be dispensed with.

On its face, it is a matter to be taken into account that the Board is given a discretion not only to waive the requirement of sitting for the examination but also the requirement of obtaining "results satisfactory to the Board" in the examination stipulated in (c)(i) for this would, in any given case, empower the Board both to overlook an applicant's poor performance in the A.M.E.C. examination and relieve him of the necessity of sitting for the examination again. No positive restriction upon the Board's power to waive compliance with the requirement in (c) (i) appears and this may be compared with the Act, before the 1981 amendment where the discretion to dispense with the examination was to be found in s 17(2)(b) and s 17(2)(c) to which I earlier referred. The discretion under s 17(2)(c) appears to have been less limited than that under s 17(2)(b), which related to "special qualifications" and "special experience".

Comparing the provisions of the Act before the 1981 amendment with its present form, one can readily agree with the observations of the Minister on the second reacting of the amendment bill to the effect that under the Act as it stood there was "numerous complex and in some cases outdated modes of registration.. (ExK). The Act in its present form has considerably simplified registration by providing for two clear-cut categories of applicants for registration - those who come under s 15 and who have the prescribed qualifications from specified local and overseas universities, the prescribed experience and are of good character. All other candidates for registration fall within s 16. There is a requirement under that section that the applicant be the holder of a degree or diploma from another university or school of medicine, but that is not sufficient of itself. The applicant must either pass the prescribed examination or satisfy the Board that he should not be required to sit for the examination or to pass it. As with applicants under s 15, the candidate under s 16 must have the prescribed experience and also be of good character.

Pausing at this point, it becomes apparent immediately that the applicant under s 15 must, in order to gain registration, pass the examinations held in the university which he attends; and the underlying assumption made by the Act is that those examinations are of a nature and standard sufficient to equip the applicant with a knowledge of medicine which is adequate, with practical experience, to fit him for general practice. No such assumption is made in the case of universities attended by applicants for registration under s 16, and this explains the requirement in (c)(i) that the candidate shall pass the prescribed examination. Professor Blacket, Chairman of the Examination Committee of the Australian Medical Council and chief examiner made the observation (p 169) that "the standard of the medical education in the Iron Curtain countries is not that which one expects to find in the English speaking world. In Poland it happens to be better than many of the others but it is still way behind on performance figures with say, the United States, the Republic of South Africa or Canada". For any examination to achieve consistency with the standard of knowledge required of the s 15 candidate, the examination necessarily needs to be directed to the level of medical knowledge which the successful s 15 applicant is presumed to have gained in his course through university, and that level is objectively demonstrated by the examinations for which he is required to sit.

In the present case the evidence establishes beyond argument that the A.M.E.C. examination is pitched to the level of what is assumed to be the level of knowledge of the graduate at the end of his course in a local or scheduled University. The A.M.E.C. examination thus seeks to achieve what is achieved by examination in the s 15 cases that is the same standard for all candidates, and a minimum level of "core knowledge" (Professor Blacket) for all candidates. The elements of Uniformity of test and standard of knowledge have their significance both in protecting the public against doctors lacking adequate knowledge, and in avoiding discrimination amongst candidates for registration, both vital features in any system dealing with registration of persons desirous of practising a profession. Once the, significance of the examination required by s 16(c)(i) is seen, it is not difficult to determine the general ambit of the discretion vested in the Board under (c)(ii).

Although s 16(c) itself makes no reference to special qualifications, or high standing, special experience or the like, the very nature of full registration shown by S 15, requiring as it does a demonstrated level of knowledge plus practical experience as the indicia of competence to practise, requires the Board to look at what in fact can be regarded as a proper substitute for the examination. The thrust of the Act is that only applicants whose knowledge and practical experience, prima facie, indicate that they will have the competence appropriate to the practice of medicine in our community should be registered, for s 30 makes plain that even after registration a medical practitioner may be suspended from practising or have his name removed from the register if he does not in fact have the competence to practise medicine. In the case of s 16 candidates, where Parliament has indicated that the degree or diploma cannot be given full significance as a measure of knowledge, it is difficult to conceive of cases in which the extent of a candidate's medical knowledge can properly be ascertained without examination, unless the candidate's own qualifications or experience or fame of themselves demonstrate the presence of the required knowledge.

Where, as in the present case, the plaintiff's degree from Lodz University is not accepted as a measure of the required medical knowledge and where he relies for proof of adequate knowledge not upon passing

the A.M.E.C. examination but upon his performance in the various hospitals where he was resident - however impressive that may have been - he is inviting the Board to deduce from that performance that he has the necessary level of knowledge; yet it by no means follows that that performance should be so regarded. The proposition being advanced by the plaintiff is largely question begging. Some of the witnesses in the case took the view, quite strongly, that the extent of medical knowledge of a candidate for registration could be better judged by his performance in practice than by an examination, but not all were agreed as to this point. Some acknowledge the reasonableness of a test, by written examination, of foreign doctors whose degrees are not regarded here as sufficient evidence of knowledge. The evidence discloses that some distinguished practitioners were critical of the A.M.E.C. examination as a test of knowledge and there is also evidence that subsequent to the examination in September 1991 for which the plaintiff sat a committee called the Fry Committee reviewed the A.M.E.C. examination and made recommendations for its improvement which were subsequently adopted (167). But for present purposes, the criticisms of the A.M.E.C. examination, although having a relevance in understanding the extent to which a candidate's knowledge is tested, need not be examined in depth because the fact is that it is the examination which Parliament has chosen as the prescribed examination for the purpose of registration. The Board's discretion to waive the examination is not to be approached upon the footing that the discretion was given to make up for any defects in the A.M.E.C. examination. Where the legislature has made clear that a particular test of knowledge by examination is to be regarded as a predominant feature for registration, and that test of knowledge is one designed to determine clinical skills over the whole field of medicine (Professor Blacket), then the Board is entitled to insist that any claim that the required knowledge has been demonstrated by actual performance of the candidate in the clinical situation be made out to its satisfaction even though this means that the candidate in that event takes on an almost impossible task.

It may be that a foreign doctor seeking registration in New South Wales could, by his performance as a resident medical officer, demonstrate to a Board comprising experienced medical practitioners such an extent of knowledge of medicine in all its spheres that the Board would accept that performance in lieu of his passing the examination, but in the very nature of things such a case must be very rare. In short, the mere fact that a number of distinguished practitioners having supervised a candidate for some months (three months seems to be the longest period) support the candidate's claim for registration without examination, in no way obliges the Board to accept the opinion of those practitioners as to the plaintiff's knowledge of medicine. The Board's discretion is to be exercised in accordance with the Act and the significant criteria for registration, level of knowledge demonstrated through examination, experience and good character are clearly expressed in the Act, both in regard to s 15 and s 16. The establishment of the possession of knowledge through written examination is wholly objective and, as I have said, achieves consistency; and this is important both from the point of view of the public perception of the system of registration and from the point of view of the candidates; it has the virtue, also, that such examinations are a practicable method of making an assessment of knowledge. For the Board to seek to assess knowledge by reference to "the opinion" of other practitioners would not only lead to a system that could be abused but it could also lead to a system that would be unworkable. It is also to be said that the Board's conclusion, expressed in its judgment of 1st September, 1982, that s 16, understood in the sense I have just explained and taken in conjunction with s 21(iii) promotes flexibility in granting registration, operates both advantageously to the candidate, and beneficially to the public and to the system of health care operating in this State, for it enables limited registration of those who can nonetheless take a part in the practise of medicine although they have not as yet proven that they have qualified for unrestricted practise.

With that analysis of the scheme of registration set up by the Act in mind, I return to counsel's submission that the Board has erred in the present case in that it ought to have been satisfied that the plaintiff was not required to pass the examination. Although in the appeal the Court is not fettered in any way by the decision arrived at by the Board, yet the duty of the Board and the duty of the Court are the same - to consider the matter on

its merits and have regard to the public welfare. The views of the experienced practitioners, who made up the Board on the question of whether the plaintiff's knowledge of medicine as disclosed by the views of others, overcame the need for examination, are not to be lightly put to one side. The Board was entitled - indeed required - to have regard to the need for uniformity of standard of knowledge, and the advantage of the objective test of examination alongside the fact that an examination was prescribed.

In considering the significance to be given to the plaintiff's qualifications, I cannot see that it did not take into account all relevant matters or that it took into account anything that was irrelevant. In my view (putting aside again the significance to be attached to the plaintiff having entered private practice) there is nothing in the evidence to indicate that the Board did not exercise its discretion in accordance with the Act, and in particular, nothing to indicate that it did not consider and give, due weight to the evidence placed before it in regard to the plaintiff's knowledge, as exhibited to others in the actual carrying out of the medical tasks assigned to him, and with which he was concerned.

The very approach which the Board has taken and expressed in its judgment of 1st September is an approach that requires the Board to look at any material the applicant places before the Board in an attempt to satisfy it that the examination need not be sat or passed, and that was done in this case at the enquiry of 27th July, 1982. There is no basis for a contention that in coming to its decision to decline registration the Board did not take into account the evidence which the plaintiff put before it as to his competence as a resident medical officer. But that evidence did not "satisfy" the board and, for the reasons I have given, it was not obliged to be satisfied that it demonstrated that degree of knowledge in the plaintiff that needed to be shown before it would register him for general practice. It was proper for the Board, in its decision of the 1st September, 1982 to state its policy in respect of registration so far as s 16(c) was concerned, for that policy was wholly in accord with the considerations contemplated by the Act as relevant to such registration. (Regina v. Port of Lincoln Authority (1919) 1 KB 176, 184. Green v. Daniells (1976-7)

13 A.L.R. 1) The policy expressed did not deny that the required level of knowledge could not be established by performance as distinct from passing examination - indeed it recognised that, but it postulated that the required level of knowledge should be plainly apparent to the Board, as it would be where the applicant for instance was of high standing or held superior credentials. By implication, the policy indicated that mere surmise by the Board as to an applicant's level of knowledge, based on the opinions of medical practitioners under whose supervision he had been, would not be sufficient.

Although the Board no doubt would recognise that there could be many reasons apart from lack of knowledge which might explain a candidate's failure in an examination, it had before it that the plaintiff failed - and we know, failed badly - and again in exercising its discretion, it was certainly not constrained to view that failure as not indicative prima facie of a gap or deficit in the plaintiff's level of knowledge of medicine.

It follows from that I have said that I am of the opinion that when on 1st September, 1982 the Board declined to grant full registration to the plaintiff, it fell into no error in exercising its discretion and, the decision at which it arrived is the decision at which I myself would have arrived.

Thus far I have dealt with the case only up to 1st September, 1982 when the Board declined registration, and I have paid no regard to the fact that the plaintiff entered general practice early in 1983, albeit under a misapprehension that he was entitled to do so, and carried on in general practice for just under two years. The plaintiff's appeal to the Court from the decision of the Board, 5th June 1983, and the Court must therefore consider the whole of the evidence which has been placed before it. Accordingly, I now turn to consider all the evidence in light of the fact that the plaintiff was in general practice from early 1983 to the end of 1984.

I have already held that the plaintiff bona fide believed that he was entitled to practise, and accordingly the case is not one to be approached upon the footing that the plaintiff has wilfully sought to evade the requirements of registration.

It should be said immediately that it is not surprising that the Board in declining registration on 5th June, 1985, nowhere has indicated that it gave any favourable weight to the plaintiff having gained general practice experience, for it and the plaintiff were at arm's length once the Board discovered what it took to be a breach by the plaintiff of the conditions of his registration. Through the eyes of the Board, the only question was, what should be done to prevent the plaintiff carrying on as a general practitioner when he was not registered as such? But the Court is in a different position from the Board, for now that all the evidence is out, the plaintiff's entering into and carrying on in general practice is not to be viewed merely in the context of a breach of the terms of his registration but simply as a mistaken act on his part.

To what extent then does the fact that he has been in general practice play a part in a determination of the question whether he should be registered as a medical practitioner? I agree wholeheartedly with Professor Blacket when he said that it was "quite unique" for the plaintiff to have gone into general practice as he did, mistakenly, and having carried on practice for so long and I confess that this aspect of the case has troubled me greatly. Had it not been for the plaintiff's mistake,, he might have passed the examination by now and gained full registration and been set up in his own practice. However, once again, the matter must be looked at in the light of the purposes of the Act, and where the "public welfare" is concerned, one cannot give much weight to speculative matters of that kind.

Consistent with the intention of the Act and the function of the Board and the Court as disclosed by the Act, the mere fact that the plaintiff has been in general practice for two years cannot of itself be a reason why the Board or the Court should waive the passing of the examination. As Dr Amos made clear, whether a practitioner is giving adequate and proper medical attention is not determined by reference merely to the fact that over a period of time he practises medicine. The critical question still remains, namely, should the Court be satisfied that he has that level of knowledge which the Act requires? Having failed in his examination and not having sat

again, he has thereby failed to demonstrate, from that test, the required level of knowledge, but have the nature and circumstances of his general practice been such that the inference is fairly open that he has the required level of knowledge and ought to be registered.

I have set out earlier the activities which the plaintiff undertook in private practice. He practiced as a locum with Australia Wide Locum Services, then as a general practitioner with Western Medical Services and Metropolitan Medical Services Pty Ltd. He finally went into general practice with Dr. Balin and opened a small surgery on the second floor of 107 Pitt Street, Sydney which he operated on a part-time basis while still working for Metropolitan Medical Services Pty Ltd. Dr Gooley, who had been a general practitioner for six years and who was in charge of the doctors employed by Metropolitan Medical Services Pty Ltd, spoke very highly of the plaintiff's ability as I have earlier recounted.

He said that he spent a considerable amount of time with him. Of course, it is true that Dr Opara's association with Dr Gooley was one in which he was brought into contact with emergency cases with considerable frequency; and it is true also that, from his own evidence, his practice required him to draw upon knowledge from virtually all aspects of medicine. And it is therefore inevitable that his knowledge and experience has increased from what it had been before he entered private practice. But that is not the end of the matter. Apart from Dr Gooley's evidence and the statement by Mrs Draper, who was the manageress of Western Medical Services, that no complaints had been received from patients or anyone else in regard to his work, there is really nothing from which any firm deductions can be drawn as to the extent of the plaintiff's overall knowledge of medicine in his capacity as a general practitioner. I do not say Dr Gooley's evidence is not impressive - it is, as the view of another general practitioner. But the task of the Board and the Court is not merely to adopt the views of those who speak favourably of a candidate - it is to be satisfied that the examination should be waived.

It is not without importance that Dr Gooley's evidence makes clear that he himself has little faith in the written examination as a test of a candidate's competence in medicine and this must be considered against the fact that qualification by examination (written and clinical) is at the heart of the system of registration prescribed in ss 15 and 16 of the Act. In

addition, Dr Gooley was unable to give any satisfactory explanation of why Dr Opara should fail so badly in the examination yet appear, in practise, to have ample background ("core") knowledge of medicine.

"HIS HONOUR: Q. You would say, would you, that this was a fairly comprehensive coverage of the general medical field? A. It has questions from each division of medicine, some psychiatric question there, general medical, some surgical.

Q. Looking at the question myself, what occurs to me to ask you is: why would a man who has shown the proficiency you have spoken about be unable to get better than just 50 per cent in a paper of this nature if he has what might be called a reasonable knowledge of medicine? A. Well -

Q. Why would not he know the answers? A. The answers are not as straightforward as they may appear, for instance, there is a question there on diabetic retinopathy. The sole word that discriminates what the answers is played on a word 'hard' or 'soft' and you have these various alternative and if you were going through the multiple choice question you see 'What is common to diabetic retinopathy?' and you see the word, as you do do in an examination, whether it is 'soft' or 'hard' makes it right or wrong. In general practice you may do a urinalysis and see whether a patient is diabetic or not, the theory is not that applicable, it is the ability to work from first principles and have a grasp of disease entities, that is the thing that is required, plus a searching mind, an ability never to give up.

Q. Would you not yourself consider, that 50 per cent in a paper of this nature was a poor result, could you describe it as other than that? A. Perhaps I would like to see some general practitioners take the same exam and see how they went. You do not require or need to have such theoretical knowledge in order to be a good doctor."

It may well be that that proposition which I have underlined has some basis in truth, but what the Board and the Court are concerned with is a system of registration designed, as far as is reasonably possible, to subject all applicants to a test which objectively considered demonstrates an adequate level of knowledge of medicine. It is entirely for the Board to say whether it is satisfied from the views of the practitioners, that that level of knowledge is present notwithstanding that the examination has not been attempted or passed but it cannot be compelled to be so satisfied any more than the Court can be so compelled.

Considerable emphasis was placed by counsel for the plaintiff upon the fact that although the Board knew early in 1984 that the plaintiff was in private practice, it took no steps designed to prevent him practising

until the end of 1984. It is contended that this indicates that the Board did not view the plaintiff as in the nature of any threat to the welfare of the patients whom he might be treating. The actions of the Board after it became aware that he was in private practice certainly do not indicate any anxiety to bring that state of affairs of an end, and indeed Dr Amos conceded that "I do not think the matter really came to that level of consideration as far as I was concerned". There were, of course, two different sets of circumstances so far as the Board was concerned; the first that the plaintiff was in fact registered, albeit conditionally, until 30th June, 1984; and second, that thereafter he held no registration at all. The inference is fairly open from the evidence that it was the latter state of affairs about which the Board was particularly concerned - the prosecution brought in the Local Court was brought in respect of this period.

Looking at all the evidence in favour of acting upon the plaintiff's demonstrated competence, it really comes down to the views of those practitioners who worked with him in his very early years in this country when he was a resident medical officer and thought he was fit to be registered - and the view of Dr Gooley, with whom he worked for a period of about twelve months. Dr McGrath thought it would be reasonable to let him continue in practice.

There is no evidence as to how he performed at the Prince of Wales Hospital nor from any of the doctors for whom he acted as locum. Dr Balin was not called. Yet if the plaintiff is to rely upon his general practice as a circumstance pointing to him having the qualification necessary for registration notwithstanding that he failed in the examination, he must be expected to put cogent evidence before the Court on the matter. As I have said earlier the A.M.E.C. examination is a searching examination and a hard examination - it is even harder now. But it is the examination prescribed for candidates under s 16. The Board and the Court are entitled, if the plaintiff does not or cannot pass that examination, to submit his performance as a practitioner to a searching probe before it decides he should be registered, and it may well be as I have earlier said, that the evidence which an applicant might bring forward in that way, however extensive would in most circumstances still not satisfy the Board or the court. But certainly the evidence in this case falls considerably short of any such probe, and it does not satisfy me that I should hold that under s 16(c)(ii), the plaintiff should not be required to sit for and pass the A.M.E.C. examination.

Parliament has not, in the Medical Practitioners Act, 1938 made the path to full registration as a medical practitioner an easy one for those who go through New South Wales universities or Schedule One universities (s 15) and the passing of written examinations is an obstacle which all must surmount if they are to be registered. Foreign doctors coming to this country with degrees and diplomas from universities other than those specified in Schedule One, must accept that the requirement of examination is no less necessary in their case unless they are content with limited registration or have such special qualifications or experience that the Board is thereby satisfied that the examination is unnecessary. But even in this latter case, as I understand the evidence of Dr Amos, limited registration will usually be the case. In following out this policy the Board, in my view, is properly having regard to the "public welfare" as the Court itself on appeal must.

Before leaving the case, I should mention that counsel for the plaintiff sought to contend that the Board was responsible for "leading the plaintiff into general practice" and that correspondence tendered to the Court showed evidence of unfairness towards the plaintiff and bias. I do not accept that submission. The plaintiff's entry into private practice arose out of an unfortunate error on both sides - the Board wrongly described, what was nothing more than a receipt for the registration fee as an "Authority to Practise as a Registered medical Practitioner" and the plaintiff mistakenly took it to be what it claimed to be. "He stubbornly persisted in this belief even after Dr Amos had told him he was not fully registered. I have already accepted the plaintiff in his claim that he believed he was entitled to practise and that being so, I do not think that those features of the case have any further significance in regard to the question the Court has to determine. However, as the plaintiff may apply again for registration after passing the A.M.E.C. examination (if he sits for it) it is proper to place on record that in my view nothing in the evidence given before me - and it has been extensive - indicates that the plaintiff is not in every respect to be regarded as a man of good character. Should he sit for the examination shortly after the proceedings conclude and pass, he would, in my view, be entitled to full registration, subject only to a short period of conditional registration to make proper allowance for the fact that he will have been away from actual practise of any kind since the end of 1984.

So far as the criticism by counsel for the plaintiff of letters sent by the secretary Mr Gardner, to the plaintiff and others is concerned, it can be said that there are grounds for criticism. But I do not consider that the evidence justifies any conclusion other than that the Board itself acted towards the plaintiff with fairness and in a responsible fashion. Dr Amos the President of the Board was an impressive witness and his evidence and the minutes of the Board Meetings show that at all times he - and it would seem - the other members of the Board gave the most careful consideration to all that the plaintiff put before the Board to support his registration.

The order of the Court is that the summons is dismissed, and the plaintiff is to pay the defendant's costs.