1994 **SH 94-106128**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

ARTHUR E. SHERMAN,

PLAINTIFF

- and -

THE GOVERNORS OF DALHOUSIE COLLEGE AND UNIVERSITY,
D.A. THOMPSON AND JANE DOE THOMPSON,
H. LESLIE O'BRIEN AND JANE DOE O'BRIEN,
BRUCE H. WILDSMITH AND JANE DOE WILDSMITH,

DEFENDANTS

D E C I S I O N

HEARD: **at Halifax, Nova Scotia before The Honourable Justice Walter R. E. Goodfellow on June 20, 1996 In Chambers**

Deadline final submissions July 15, 1996

DECISION: **July 23, 1996**

COUNSEL: **Virve Sandstrom**
Solicitor for the Defendants

Mr. Sherman self represented, not in attendance

GOODFELLOW, J. :

1. BACKGROUND

The chronology of pleadings in this file is as follows:

(1) Originating Notice with Statement of Claim filed June 16, 1994 and the named defendants are:

1. The Governors of Dalhousie College and University
2. D. A. Thompson
3. Jane Doe Thompson
4. H. Leslie O'Brien
5. Jane Doe O'Brien
6. Bruce H. Wildsmith
7. Jane Doe Wildsmith

(2) Mr. Sherman's Statement of Claim is broken down into a number of paragraphs entitled FIRST STATEMENT OF CLAIM, SECOND FURTHER AND ADDITIONAL STATEMENT OF CLAIM, concluding with a FIFTH, FURTHER AND ADDITIONAL STATEMENT OF CLAIM followed by a prayer for extensive and varied relief. The first Statement of Claim sets out that the plaintiff is 76 years, retired and resides at Centre Burlington, Nova Scotia and he was at one time enrolled and evaluated by Dalhousie while a student in the Faculty of Law. D. A. Thompson, H. Leslie O'Brien and Bruce H. Wildsmith are recited as having taught the plaintiff specific courses in law. Mr. Sherman claims in contract, in part written and in part orally and through conduct of the parties and goes on to recite a number of allegations of breach of such contract. The first Statement of Claim claims a loss in the sum of $100,000 plus interest and proceeds to a second Statement of Claim which refers to the same loss.

The third further and additional Statement of Claim alleges in paras. 3 and 4:

3. That from on or about September, 1991 to on or about May, 1993

Defendants, and each of them, willfully, intentionally, maliciously, knowingly, unlawfully, wrongfully or by their negligence and lack of skill caused Plaintiff to become "brain dead" and a "vegetable"; that Plaintiff enrolled in First year law at First Defendant and on mid term examinations in Criminal Law, Public Law, Property and Torts had a B- average; that from that date until on or about May 26, 1993 Plaintiff's alleged grades steadily became lower as Defendants, and each of them, willfully, intentionally, maliciously, knowingly, unlawfully, wrongfully or by their negligence and lack of skill caused Plaintiff to become "brain dead" and a "vegetable"; that Plaintiff's first year, first term grade in Contracts is not included inasmuch as the Professor, M. McConnell, is an extremely poor teacher who is unable to prepare examinations or to read, write or understand the English language.

> 4. That Plaintiff is, and is informed and believes and on that basis alleges that he is "brain dead" and a vegetable" and that he will continue to be "brain dead" and a "vegetable" for a length of time that Plaintiff can not particularize.

The fourth Statement of Claim raises alleged Charter rights and the fifth Statement of Claim of conspiracy ending with a monetary claim of $100,000 plus $50,000 against each of the defendants as punitive or exemplary damages and an undetermined amount for aggravated damages. An order in the nature of **mandamus** to cause a re-evaluation of the grades assigned to Mr. Sherman and several other sought after declarations of relief including a declaration that each of the defendants is biased and prejudiced against Mr. Sherman.

(3) Defence filed November 30, 1994.

(4) Defendant, Dalhousie's Demand for Particulars, July 13, 1994

(5) Plaintiff's Bill of Particulars (Answer to Demand for Particulars), August 3, 1994.

(6) Plaintiff's first set of Interrogatories, January 24, 1995.

(7) Plaintiff's Interlocutory Notice, Application (inter partes) February 7, 1995 supported by Affidavit of Arthur E. Sherman.

(8) Order issued by the Prothonotary dismissing action against Jane Doe Thompson, Jane Doe O'Brien and Jane Doe Wildsmith without costs.

(9) Order before the Honourable Justice Kelly, March 20, 1995 dismissing application on Mr. Sherman's Interlocutory Notice of February 7, 1995 on the basis that the Answer to Interrogatories has been obtained or will be delivered. Application dismissed without costs to any party.

(10) Affidavit of Virve Sandstrom filed June 14, 1996, Exhibit D - two copies of the Answers to the first interrogatories.

(11) Plaintiff's second set of Interrogatories, December 6, 1995.

(12) Interlocutory Notice (Inter Partes) filed by Mr. Sherman December 20, 1994 for Answer to second Interrogatories. Costs of $2000 and disbursements - supported by Affidavit of Arthur E. Sherman.

Mr. Sherman's address is listed in this Affidavit as 3634 - 9th Street, Vernon British Columbia V1T 6S7.

(13) Order before the Honourable Justice Hiram Carver dismissing Mr. Sherman's application for Interrogatories set for February 8, 1996 on the basis that the same were mailed to Mr. Sherman February 7, 1996. Order directs payment of $100 costs by Mr. Sherman to the defendants forthwith.

(14) Interlocutory Notice filed by Mr. Sherman February 5, 1996 seeking the same relief as set out in his December 20, 1995 application. Application supported by Affidavit and memorandum dated January 29, 1996 directed to Chambers Judge.

(15) Notice to Admit filed by Arthur Sherman March 12, 1996.

(16) Order, Hon. Mr. Justice David H. MacAdam, January 10, 1996 dismissing Mr. Sherman's application set for December 28, 1995 and awarding costs against Mr. Sherman of $100 payable forthwith.

(17) Affidavit of Virve Sandstrom filed June 14, 1996.

(18) True copy of the Defendant's Answers to the second Interrogatories as Exhibit "I" and forwarded by letter dated February 7, 1996 to Mr. Sherman.

(19) Plaintiff's third set of Interrogatories filed March 12, 1996.

(20) Interlocutory Notice (Inter Partes) seeking an Order relating to Interrogatories filed by Mr. Sherman June 11, 1996. This also seeks an Order against Faye L. Woodman.

(21) Affidavit filed June 11, 1996 by Mr. Sherman whose address is now P.O. Box 1155 South Bend, Washington, USA 98586, alleging failure by the three professors and Faye L. Woodman to answer the Interrogatories.

(22) Interlocutory Notice filed by Mr. Sherman, June 17, 1996 seeking an Order requiring Susan Ashley and/or the Associate Dean of Law to file and serve a reply to Notice to Admit dated March 6, 1996 supported by an Affidavit wherein Mr. Sherman alleges the previous reply to the Notice to Admit is not sufficient.

(23) Copy of reply to Notice to Admit dated April 3, 1996 in file.

(24) Order the Hon. Mr. Justice Alan P. Boudreau, July 2, 1996 relating to the Order sought against Susan Ashley and/or the Associate Dean of Law. Order recites application is without merit and is dismissed and ordering Mr. Sherman to pay costs in the amount of $350 inclusive of disbursements.

(25) An outstanding application by Mr. Sherman for an Order directing Answer to the third set of Interrogatories came on before the Hon. Justice Walter R. E. Goodfellow in Chambers June 20, 1996. Determination Mr. Sherman would not likely have had sufficient time to respond to lengthy communication from Ms. Sandstrom, solicitor for the defendants and therefore Mr. Sherman was provided up to July 2nd to make further submissions. This was followed by additional correspondence and a request by Mr. Sherman for additional time as he had not received Ms. Sandstrom's correspondence until June 25, 1996. On July 2nd Mr. Sherman was advised that some additional time is reasonable and appropriate and called for his response by Monday, July 15th. The Court has received further communication from Mr. Sherman, a seven-page Memorandum of Authority dated June 28, 1996.

2. ISSUES

(1) Is a party required to attend personally or by solicitor when that party issues and serves an Originating Notice (Application Inter Partes) ?

(2) Should an Order issue directing any or all of the defendants to respond to the third set of Interrogatories?

(3) Status of the plaintiff, Arthur E. Sherman?

3. CIVIL PROCEDURE RULES

Object of rules
1.03.

The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

Authority of solicitor to act for a party under Rules
1.08.

Where a rule provides that any act may be done or omitted by a party, or the service of a document may be done on or by a party, or the parties may by written agreement agree to any act or omission, the term "party" shall, unless the context otherwise requires, be deemed to mean the "party or his solicitor".
[Amend. 12/12/74]

Person under disability shall commence a proceeding etc. by litigation guardian
6.02.

(1) A person under disability shall commence or defend a proceeding by his litigation guardian. [E. 80/2(1)]

(2) Unless a rule otherwise provides, anything in a proceeding that is required or authorized by the rules to be done by a party shall or may, if the party is a person under disability, be done on his behalf by his litigation guardian. [E. 80/2(2)]

(3) A litigation guardian of a person under disability shall act by a solicitor. [E. 80/2(3)]
[Amend. 20/6/94]

Form, number etc. of interrogatories
19.02.

(1) Interrogatories shall relate to the same matters as may be dealt with by an examination for discovery under rule 18.09.

(2) Unless the court otherwise orders to protect a party or person interrogated from annoyance, expense, embarrassment or oppression, the number of interrogatories or sets of interrogatories to be served is not limited.

Insufficient answer
19.04.

If a person on whom interrogatories have been served fails to answer any one or more of them or answers insufficiently, the court may, upon such terms as are just, make an order requiring him to answer or to answer further, either by affidavit or oral examination, or to answer any other interrogatory. [E. 26/5]

Proceeding in absence of party failing to attend
37.11.

(1) When a party fails to attend on a hearing of an application or on

any adjournment thereof after being served with a notice of application, the court may proceed in his absence. [E. 32/5(1)]

(2) A party who has failed to appear on an application through accident, mistake, insufficient notice or other just cause may, within ten days from the time when the order granted on the application comes to his attention, apply on notice to set aside or vary the order and the court may do so on such terms as it thinks just. [E. 28/4(1); 32/5(4)]

Application of rules to applications
37.18.

The provisions of these Rules shall, with any necessary modification, apply to any application.

Issue (1) Is a party required to attend personally or by solicitor when that party issues and serves an Originating Notice (Application Inter Partes) ?

Mr. Sherman, in a letter dated June 5, 1996 directed to the Honourable Chambers Judge, on his application for an Order compelling Answer to Interrogatories previously filed, included:

> Since it is clear that the law has been violated by the defendants who clearly have no intention of answering said Interrogatories, I deem it unnecessary that I appear to argue orally. The matter will therefore be submitted on the support Affidavit.

Mr. Sherman's application for an Order to require a reply to Notice to Admit was accompanied with a letter from him dated June 7, 1996 addressed to the Hon. Chambers Judge and in the concluding paragraph he states:

> Therefore the matter will be submitted on the Notice and Affidavit since I do not deem it necessary that I appear personally or by counsel.

In a letter dated January 29, 1996, directed to the Honourable Chambers Judge, Mr. Sherman included in that letter the recital that he deemed it unnecessary to appear to argue orally.

Mr. Sherman, in his application for an Order compelling Answer to the Second Interrogatories, sent a letter dated December 14, 1995 addressed to the Honourable Chambers Judge attaching an acknowledgment from the solicitor for the defendants of Mr. Sherman's communication received December 5th indicating that there would be a review of the further interrogatories and response in due course. Mr. Sherman advised the Chamber's Judge that he interpreted this as a refusal to answer:

> The record herein and the said letter so clearly constitute a refusal that I deem it unnecessary that I appear to argue orally. The matter will therefore be submitted on the supporting affidavit.

This action arises generally out of the attendance by Mr. Sherman as a student in the Faculty of Law at Dalhousie University, and in his file material, he relates in his response to Demand for Particulars proof that he has become "brain dead" and a "vegetable" and that he is a graduate of the University of Michigan Law School.

There is nothing in the **Civil Procedure Rules of Nova Scotia** that appears to deal directly with the personal attendance of an applicant on her/his application for relief, nor does there appear to be any specific rule addressing the failure of an applicant to attend on her/his application. The non-attendance of a party at trial is governed by **CPR** 30.01(2), the

issuance of an Originating Notice (Inter Partes) is governed by **CPR** 9, service by **CPR** 10 and generally by **CPR** 37. **CPR** 37.11 provides guidance when the person to whom the applicant has given and served notice fails to attend but is silent on the failure of the applicant to personally attend or attend by a solicitor.

The Order of the Honourable Mr. Justice A. David MacAdam issued January 10, 1996 cited:

> AND UPON it appearing that Mr. Sherman was not in attendance at the application nor anyone on his behalf . . .

and in the Order of the Honourable Mr. Justice Hiram Carver issued February 23, 1996:

> AND UPON IT APPEARING that Mr. Sherman was not in attendance at the application nor anyone on his behalf . . .

and in the Order of the Honourable Mr. Justice B. William Kelly issued March 20, 1996 there is the recital:

> With no one appearing on behalf of the plaintiff . . .

and finally in the Order of the Honourable Mr. Justice Allan P. Boudreau issued July 2, 1996:

> AND UPON no one appearing on behalf of the plaintiff on the return date specified in the plaintiff's Interlocutory Notice (Application Inter Partes);

It should have appeared to Mr. Sherman that his non-attendance of his own applications was of some consideration.

In this application, extensions of time were given to Mr. Sherman to respond and

complete his application.

The general rule is that a person who files an application must either attend personally or by a solicitor or seek the leave and permission of the Court to be absent and have the application addressed solely on the documentation filed. On an application seeking leave and permission to be relieved from attendance on one's own application, the defendant would have an opportunity to express his/her opposition including representations as to the entitlement or otherwise of cross examination of the applicant on his/her affidavit filed in support of the application.

For the purposes of this application, I extend the Court's discretion perhaps further than it ought to be stretched in that I specifically do not take into account Mr. Sherman's non-attendance in the determination of this application. I do, however, direct that there be a provision in the order finalizing this application specifically directing that if there are any further applications in this action filed by or on behalf of Mr. Sherman, he must attend personally or preferably represented by a solicitor, and his failure of attendance as directed shall constitute sufficient reason for dismissal unless Mr. Sherman has first obtained leave of the Court and permission to have the application processed without his personal attendance or representation by a solicitor on record.

Issue (2) Should an Order issue directing any or all of the defendants to respond to

the third set of interrogatories?

Civil Procedure Rule 19.02 (2) expressly dictates that the number of interrogatories to be served is not limited. In this respect Nova Scotia differs from many other jurisdictions. In some jurisdictions only one interrogatory can be issued followed, where any answer is not satisfactory, by an entitlement of what in effect is an opportunity to ask and receive answers to supplementary questions.

In Nova Scotia the number of interrogatories is only to be limited if the Court concludes it is necessary to protect a party or person from annoyance, expense, embarrassment or oppression. It should be noted that interrogatories are only one of a number of pre-trial procedures, and normally interrogatories have specific goals in mind, and usually precede oral discovery. Many basic principles apply equally to discovery by interrogatories and oral discovery; however, they are not without different considerations:

(a) In both interrogatories and oral discovery, the person being examined shall answer any question within her/his knowledge or means of knowledge. This places a requirement on the person being examined to ascertain the answer when such is within their means. Ignorance is not an acceptable answer when an answer is capable of being determined if acquiring the answer is reasonably within the means and internal capacity of the person being examined.

(b) In both discovery by way of interrogatories and oral discoveries, it is mandatory that the question be answered if it is not privileged, provided that it is relevant to the subject matter of the proceeding. The answer must be provided even though it is not within the scope of the pleadings.

(c) In both discovery by way of interrogatories and oral discovery, the person being examined may be required to inform herself/himself the answers within that person's means of knowledge.

Interrogatories are not to be in the nature of cross examination. Oral examination permits cross examination. **King v. King** (1975), 20 N.S.R. (2d) 260 and **CPR** 18.08.

(d) Interrogatories in Nova Scotia can be used to obtain the names of witnesses.

(e) Interrogatories are not a substitute for the discovery of documents.

(f) Interrogatories are narrower in scope than oral examination for discovery.

(g) The purpose of interrogatories is to enable the party delivering them to obtain admissions of fact to assist in establishing her/his case and may also provide a foundation upon which further examination in a particular cross examination can take

place if and when examination for discovery is held.

(h) Interrogatories may be used to obtain admissions of facts upon which the other party bases affirmative pleadings and denials. In other words, the overall purpose of interrogatories is to obtain admissions of fact. In determining any limitation on the discovery process, the Court must always keep in mind the object of the **Civil Procedure Rules.** The fullest possible disclosure is the general rule in Nova Scotia, and admissions tend to bring about compliance with the object of the rules.

Generally a second or further set of interrogatories will not be permitted if the question sought to be proposed is one that ought to have been included in the previous set of interrogatories. **Love v. Mixing Equipment Co. Inc.** (1986) 10 C.P.C. (2d) 237 (Master):

> Where a party serves a second list of questions, those questions must be connected to the question to which the party received an unsatisfactory answer.

This is a general proposition not rigidly adhered to in all cases. Usually if a party has inadvertently omitted a question or has legitimate supplementary questions, counsel address it through correspondence rather than go to the expense of a formal second set of interrogatories. This probably accounts for the rareness of a second set of interrogatories. Questions in a third set of interrogatories that might have been included in the first or second set of interrogatories contribute to a consideration of the expense being incurred and the determination of whether or not oppression is occurring. In this case, I am left with

a clear impression that if a third set of interrogatories was permitted, there is almost an inevitability that a fourth and probably a fifth set of interrogatories would emerge. Williston and Rolls, **The Law of Civil Procedure**, vol. 2 (Butterworths, 1970) at p. 808:

OPPRESSIVE INTERROGATORIES

> Questions will not be allowed if they are oppressive, or put an undue burden on the party being questioned; interrogatories which are unreasonable, vexatious, prolix, unnecessary or scandalous need not be answered. Oppressiveness depends not so much on the question itself but on the nature of the action. Questions which are unobjectionable in form may in the circumstances of a particular case be vexatious, and each case must be judged on its own circumstances.

I have reviewed all three sets of interrogatories, all the correspondence and documentation surrounding the interrogatories including the answers to the first and second set of interrogatories. In Mr. Sherman's Memorandum of Authority, he accuses the defendants, fraudulently and contemptuously of destroying all means whereby it could be proven that the plaintiff did not fail his exams, he alleges that the defendants are attempting to conceal their intentional and wilful conduct and accuses counsel of record for the defendant (not counsel in this application) of lying to the Chief Justice. The majority of the questions posed by Mr. Sherman in his third set of interrogatories do not come within the basic applicable principles in that a number of them are far more appropriate for examination for discovery in that they seek a narrative answer. In some cases they are irrelevant, and in many cases, if they were relevant, they ought to have been placed in either the first or second set of interrogatories. The inescapable conclusion is that Mr. Sherman is attempting to conduct an oral examination for discovery by written interrogatories. The

Court must be satisfied on a balance of probabilities that a party needs to be protected from annoyance, expense, embarrassment or oppression in order to limit the number of interrogatories.

The argumentive, unprofessional approach by Mr. Sherman demands protection for the defendants from further annoyance, unnecessary expense, attempts at embarrassment and the overall oppression that is indicated in this file, and accordingly the defendants are not required to answer this set of interrogatories or any other set of interrogatories which may be advanced by Mr. Sherman without special specific leave of the Court.

4. STATUS

The Court has an inherent obligation to ensure that parties under disability are provided the assistance of a guardian on their behalf who is required to act in the interests of protecting the person under disability. That person shall act by a solicitor. Mr. Sherman, in his Statement of Claim, filed the 16th of June, 1994 pleads that he is "brain dead" and a "vegetable" at that time, and that he will continue to be such for a length of time that he cannot particularize. With the benefit of hindsight, the Originating Notice and Statement of Claim ought not to have been received by the Prothonotary's office. Where the pleadings disclose and raise estoppel by pleadings that the plaintiff acknowledges and pleads mental incompetence. In such a circumstance, the Originating Notice and Statement of Claim ought not to have been issued without compliance with **Civil Procedure Rule** 6.02.

Mr. Sherman, in his response to the defendant's demand for particulars filed what he entitles a Bill of Particulars August 3, 1994 and at least three times in that response pleaded his incapacity in the following terms:

> (i) That as set out in the Statement of Claim herein, and otherwise, and in accordance with Civil Procedure Rule 6 and The Incompetent Persons Act Plaintiff was, and is, incompetent, "brain dead", a "vegetable" and without capacity to pursue the reveiw (**sic**) procedure, rights and remedies set out in said paragraphs.

He goes on to refer as well as to what would have been the state had the plaintiff not been incompetent.

The Court would fail in its duty if it did not require full compliance to **Civil Procedure Rule** 6.02 or alternatively evidence including at least an affidavit of a qualified psychiatrist who, through an up-to-date examination and testing, would be able to attest to Mr. Sherman no longer being mentally incompetent. As to precisely what would be required, would be for the Chambers Judge on any such application to satisfy the Chambers Judge that the mental incompetency pleaded by Mr. Sherman as presently existing no longer exists negating the need for compliance with **Civil Procedure Rule** 6.02.

5. RESULT

The application by Mr. Sherman to seek compliance with the third set of interrogatories is dismissed with costs taxed and allowed to the defendants in the amount

of $950 payable forthwith. The order will provide that Mr. Sherman will not file or serve any further interrogatories on any party or person without first have obtained leave of this Honourable Court.

This action by Mr. Sherman is stayed unless and until there has been compliance with **Civil Procedure Rule** 6.02 for an order of this Court concluding Mr. Sherman is no longer incompetent negating the requirements of **Civil Procedure Rule** 6.02.

Order accordingly.

J.