



## **Endodontic Dental File Blows a Hole Through Steel Curtain of the Statute of Limitations**

by James L. Lutfy, Esq.

The statute of limitations, plainly speaking, is a statute that limits the liability of dentists to 2 1/2 years from the date of the alleged negligent act or omission by the dentist while the dentist and the patient have an expectation of treatment. In the State of New York, the statute of limitations is governed by CPLR 214-a, which states the following:

“An action for ...dental... malpractice must be commenced within 2 years 6 months of the act, omission or failure complained of, or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery, or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier... For purpose of this section, the term ‘foreign object’ shall not include a chemical compound, fixation device or prosthetic aid or device.” (Emphasis added).

The purpose of this article is to show that (1) if during root canal therapy, a piece of a dental file breaks during extirpation of nerve tissue, the statute of limitations will not begin to run until the dentist informs the patient of the event, or until the patient knew or reasonably should have known that a piece of dental file has been left in the tooth, (2) a piece of a dental file in a tooth is a “foreign object,” and (3) a court may infer a nexus between a broken dental file and a plaintiff’s complaint of an injury.

According to a recent decision by the Appellate Division of the Second Department of the State of New York, *Polichetti v. Cohen* - AD2d-, 702 NYS2d 85, (2d Dept. 2000), the Court stated the following:

“The broken dental file which was left inside of the plaintiff’s tooth is a ‘foreign object’ within the meaning of CPLR 214-a, which delayed the running of the Statute of Limitations until the date the foreign object was or reasonably should have been discovered (see, *Rockefeller v. Moront*, 81 NY2d 560; *Carmona v. Lutheran Med. Ctr.*, 238 AD2d 535).”

### **Facts and Procedural History**

The plaintiff commenced this action by filing a summons and complaint, and by purchasing an index number from the Clerk of the Court during 1997. The complaint sought damages for personal injuries suffered as a result of the alleged dental malpractice of the defendant-dentist in the performance of root canal therapy on tooth 14 more than ten years earlier, in 1986. (Please note that the statute of limitations is 2 1/2 years from the date of each alleged act or omission).

Because the plaintiff had not returned to the defendant-dentist's office within 6 years, the dentist discarded the plaintiff's dental records. This was significant, because although the plaintiff claimed that he recalled the defendant performed root canal therapy on tooth 14 when he was 12 years old, the defendant-dentist denied this. The proof that the defendant performed the root canal therapy on tooth 14 was the plaintiff's memory, and payment records and receipts, which established in general that the defendant treated the plaintiff and the plaintiff's parents, but did not establish that the defendant performed root canal therapy on tooth 14. The plaintiff lacked specific proof that the defendant performed root canal therapy on tooth 14 when the plaintiff was 12 years old.

The theory of the negligence against the defendant was that he failed to advise the plaintiff of the reasonable risks of root canal therapy, including infection, failure, breakage of a dental file during the procedure, etc., and that after the alleged breaking of the file, the defendant neither informed the plaintiff nor his parents about the broken file.

The defendant-dentist, although vehemently denying he performed root canal therapy on tooth 14 on the then 12 year old plaintiff, was at a disadvantage. First, obviously he had no records to prove that he did not perform the root canal therapy. Second, although the defendant testified at this deposition that if he had broken the file he would have informed the parents, he had no proof he informed them. Third, the plaintiff produced an x-ray taken by a dentist in 1997 that showed that root canal therapy had been done on tooth 14, and a piece of a dental file was in one of the canals.

Fourth, the plaintiff had not been to a dentist from 1986-1988 to 1997, when he began to have pain and infections in the upper left quadrant. It was at that time the plaintiff claimed he was told by a dentist that an x-ray showed a piece of a dental file in one of the canals of tooth 14. Fifth, the plaintiff's memory of his prior dental care was sketchy. Although he testified that he had seen another dentist possibly before and after he saw the defendant-dentist, these dental records were unavailable, as the dentist had retired, and had discarded the treatment records of the plaintiff.

Consequently, the defendant asked the Court to dismiss the complaint based on the failure of the plaintiff to commence the lawsuit within the 2 1/2 year statute of limitations, and because the alleged departures of the defendant were not a cause of the plaintiff's injuries. The plaintiff opposed the defendant's application based on the "foreign object exception" listed in CPLR 214-a, and by submitting an affidavit by a dentist, who stated that the defendant departed from accepted practice by not informing the plaintiff about the risks of root canal therapy, and by not informing the plaintiff that he had broken a file during root canal therapy.

Upon presentation of the motion to dismiss the plaintiff's complaint, the lower Court found that the piece of dental file, allegedly left in the plaintiff's tooth 14 by the defendant, was a "foreign object," and that the 2 1/2 year statute of limitations did not apply. For purposes of a motion to dismiss based on the statute of limitations, the Court will deny the defendant-dentist's motion if it finds, assuming all the evidence the plaintiff submits to be true, that there is an arguable question of fact that can be presented to a fact-finder at trial. Thus, the Court assumed that the defendant-dentist performed root canal therapy on tooth 14, and left a dental file behind during the procedure, and classified that the dental file was a "foreign object." A "foreign object" has been defined by the Courts as an object that has been negligently left behind in the patient's body without any intended continuing treatment purpose, and as an object that a dentist did not intend to leave inside the body.

Anticipating this defense, I submitted an affidavit from the defendant stating that even if he performed root canal therapy on tooth 14, and even if he broke a file during extirpation, the breaking of a dental file during root canal therapy was not a departure from accepted practice, and that it was customary for a dentist when confronted with an unremovable broken dental file to make it part of the gutta percha fill. Thus, although the breaking of the file was not intentionally done, the dentist intended to leave the broken file in the canal, and make it part of the fill. The rationale behind this argument was that the dental file transforms itself from a “foreign object” into an object that had a treatment purpose.

The defendant also argued that even if he had broken the file during root canal therapy, and failed to inform the patient of this occurrence, this departure from accepted practice did not cause damage to the plaintiff. First, the tooth, after root canal therapy, was asymptomatic for 10 years, which is within normal limits. Second, the plaintiff’s mouth was so neglected, as evidenced by rampant decay, that the plaintiff’s damages were the result of his failure to have proper oral hygiene and to seek timely dental care. (In a dental malpractice action, to recover money damages, a plaintiff must not only prove that a dentist departed from the standard of care, but also that the defendant’s departure from the standard of care was a substantial factor in causing damages).

To counter this argument, the plaintiff submitted an affidavit from a dentist, which stated the following in part:

“....., being duly sworn, deposes and says:

1. I am a D.D.S. and certified to practice dentistry in the State of New York.
2. I examined [the plaintiff]. Upon review of his x-rays, I found what appeared to be a possible large piece of a file, ordinarily used in a root canal procedure inside [the plaintiff’s] tooth. This was left inside tooth #14, the upper left first molar. Presumably, this file had broken off during such a procedure.
3. I advised [plaintiff] of my findings. I also told him what the probable repercussions would be. There was no guarantee the swelling would not return and, in fact, chances were good it would return, its recent occurrence, notwithstanding.
4. I advised [plaintiff], to a reasonable degree of medical certainty, that persistent infections, could only be avoided by the removal of the tooth.
5. Based upon my review of the x-rays and the patient’s history, I find that a file was left inside the patient’s tooth. The [plaintiff] claimed he was never advised of the potential risks involved in the procedure, risks that would include infection, loss of teeth, pain, etc. The [plaintiff] also claims he was never advised that a piece of file had actually broken off inside his tooth, and was left inside. Nor was any follow-up on this tooth recommended.
6. It is submitted, to a reasonable degree of dental certainty, that if what [plaintiff] claims occurs, that he was not advised of the risks involved in the procedure or the fact that the file had, in fact, broken off inside his mouth, this was not treatment in accordance with acceptable standards as taught to me in my dental education and training.”

In my opinion, it was fatal to plaintiff that his expert-dentist did not assert that these departures, even assuming they occurred, were a substantial factor in causing injury to the plaintiff. If you read the affidavit of the plaintiff's expert carefully, you will see that the plaintiff's expert failed to assert that the defendant's alleged departures were a substantial factor in causing the plaintiff's injuries.

Admittedly, the plaintiff's expert stated that chances were good that swelling might return, and that persistent infections could only be avoided by removal of the tooth.

However, the plaintiff's expert never explicitly stated that any malady or pathology of the plaintiff was the result of the failure to inform the plaintiff either of the risks of root canal therapy or of the occurrence of the breakage of the dental file during the root canal procedure.

It is important to understand that the alleged departures by the defendant were not the breakage of the file, or the failure to remove the piece of dental file, but rather they were the failure to inform the plaintiff of the risks of root canal therapy, and the failure to inform the plaintiff that the dental file had broken during root canal therapy.

Notwithstanding, the lower Court denied defendant's motion to dismiss the complaint, and the defendant appealed to the Appellate Division, Second Department.

The Appellate Division affirmed the lower court order denying the defendant-dentist's motion to dismiss the lawsuit based on the statute of limitations. The Court also held that the dental file that allegedly broke during root canal therapy was a "foreign object," pursuant to CPLR 214-a, and that the plaintiff's expert's affidavit established causal connection between the defendant's alleged departures and the plaintiff's alleged injuries.

## **Conclusion**

The lessons to be learned from this lawsuit are: (1) if, during root canal therapy, you break a dental file, inform the patient, and note it in your records, so that you can start the running of the statute of limitations; (2) in the State of New York as of this date, a piece of a dental file broken off during root canal therapy, and lodged in a canal of a tooth, is considered a "foreign object," which will toll the running of the statute of limitations until the patient is informed or should have learned of the event; (3) a Court might infer from the breaking of a dental file that whatever injury the plaintiff claims resulted from this breakage is causally connected; (4) you should save your dental records as long as reasonably possible - I would recommend 10 years minimum - in light of the decision in this lawsuit, especially for an infant or adolescent patient.

Ironically, when this lawsuit was scheduled for jury selection, the plaintiff discontinued the lawsuit feeling that a jury would not return an award commensurate with the time and effort needed to prosecute the trial.

---

## **Author's Credit**

James L. Lutfy, Esq. is a partner with the law firm of Lutfy and Santora, 1405 Clove Road, Staten Island, NY 10303. A large portion of Mr. Lutfy's practice is in the defense of dentists for regulatory and malpractice matters. You can reach Mr. Lutfy at (718) 442-2272 or by e-mail at [lutfysantora@netzero.net](mailto:lutfysantora@netzero.net).