Date: 20240410
Docket: CI 22-01-36700
(Winnipeg Centre)
Indexed as: Peters v. Kalvandi et al.
Cited as: 2024 MBKB 58

# COURT OF KING'S BENCH OF MANITOBA

**B E T W E E N:**

| | | |
|---|---|---|
| KYLE PETERS, | ) | Deborah Yeboah for the applicant |
| applicant, | ) | Michael Finlayson |
| - and - | ) | for Dr. Maryam Kalvandi |
| DR. MARYAM KALVANDI AND WINNIPEG SQUARE DENTAL CENTRE, | ) | Michael Zacharias for Winnipeg Square Dental Centre |
| respondents. | ) | |
| | ) | Judgment Delivered: April 10, 2024 |

## TOEWS J.

### INTRODUCTION

[1] Kyle Peters, the applicant seeks leave to commence an action against the two respondents in relation to the performance of a root canal by Dr. Kalvandi. Dr. Kalvandi is a dentist at the Winnipeg Square Dental Centre ("Winnipeg Square").

[2] This application was commenced on July 27, 2022, pursuant to subsection 14(1) of ***The Limitations of Actions Act***, C.C.S.M. c. L150 (the "***LAA***"). The applicable limitation period is found at s. 44 of ***The Dental Association Act***, C.C.S.M. c. D30

(the "***DAA***"). Both the ***LAA*** and the ***DAA*** have been repealed, but owing to the date on which the alleged cause of action arose, the legislative provisions of the ***DAA*** and the ***LAA***, and not the legislation that has replaced them, governs this application.

[3] Section 44 of the ***DAA*** (now repealed) provides:

> **Limitation of actions**
> 44 No person is liable in an action for negligence or for malpractice by reason of professional services requested or rendered unless the action is commenced within two years from the date when, in the matter complained of, those professional services rendered terminated and the person was a licensed member, dental assistant or dental corporation at the time the negligence or malpractice occurred.

[4] The relevant sections of the ***LAA*** (now repealed), including s. 14(1) of the ***LAA***, provide:

> **Extension of time in certain cases**
> 14(1) Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between
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> (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
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> (b) the date on which the application was made to the court for leave.
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> . . . . .
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> **Evidence required on application**
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> 15(2) Where an application is made under section 14 to begin or to continue an action, the court shall not grant leave in respect of the action unless, on evidence adduced by or on behalf of the claimant, it appears to the court that, if the action were brought forthwith or were continued, that evidence would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action.
>
> . . . . .
>
> **Definitions**
> 20(1) In this Part

**"appropriate advice"** in relation to any fact or circumstance means the advice of competent persons qualified, in their respective spheres, to advise on the professional or technical aspects of that fact or that circumstance, as the case may be;

**"court"** in relation to an action, means the court in which the action has been or is intended to be brought.

**Reference to material facts**
20(2) In this Part any reference to a material fact relating to a cause of action is a reference to any one or more of the following, that is to say:
(a) The fact that injuries or damages resulted from an act or omission.
(b) The nature or extent of any injuries or damages resulting from an act or omission.
(c) The fact that injuries or damages so resulting were attributable to an act or omission or the extent to which the injuries or damages were attributable to the act or omission.
(d) The identity of a person performing an act or omitting to perform any act, duty, function or obligation.
(e) The fact that a person performed an act or omitted to perform an act, duty, function or obligation as a result of which a person suffered injury or damage or a right accrued to a person.

**Nature of material facts**
20(3) For the purposes of this Part, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a person of his intelligence, education and experience, knowing those facts and having obtained appropriate advice in respect of them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence based on a provision of this Act or any other Act of the Legislature limiting the time for bringing an action, an action would have a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the actions.

**Where facts deemed to be outside knowledge**
20(4) Subject to subsection (5), for the purposes of this Part, a fact shall, at any time, be taken not to have been known by a person, actually or constructively if
(a) he did not then know that fact;
(b) in so far as that fact was capable of being ascertained by him, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of ascertaining the fact; and
(c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, the fact might have been ascertained or inferred, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of obtaining appropriate advice with respect to the circumstances.

[5] Although counsel for the applicant in her written material took the position that the corporate defendant, Winnipeg Square, was not entitled to rely on the limitation period relied upon by Dr. Kalvandi, that argument was not advanced at the hearing. The application proceeded on the basis that the limitation period found at s. 44 of the ***DAA*** and the provision governing the extension of time set out at s. 14(1) of the ***LAA*** are relevant and applicable to both respondents.

## THE FACTS

[6] The applicant was a patient at Winnipeg Square starting in 2019. He is not a dentist and does not have any experience working in the dental or healthcare industry. The applicant had been involved in a motor vehicle accident in or around April 2019, which resulted in various injuries, including a broken neck, facial lacerations, severance of a small portion of his ear, and some damage to his teeth.

[7] On August 12, 2019, the applicant attended at Winnipeg Square and was seen by Dr. Kalvandi for the purposes of treatment of teeth and jaw injuries sustained in the motor vehicle accident.

[8] Dr. Kalvandi assessed the applicant's teeth and performed dental procedures, including a root canal on tooth #46 (the "root canal"). The applicant returned to Winnipeg Square several times in the years following the root canal for various treatments and procedures, including dental cleaning, dental implants and treatment of cavities. However, no further work was done in respect of or in relation to the root canal.

[9] Between June 2021 and August 2021, the applicant suspected there was a crack in his tooth #46 and began to experience tooth abscesses. He attended at Greenwoods Dental & Surgical Centre ("Greenwoods") and was advised that there appeared to be a crack or perforation in tooth #46. He was referred to a root canal specialist, Dr. Brueckner, at another Greenwoods location for confirmation.

[10] On or about September 10, 2021, the applicant saw Dr. Brueckner. Based on the x-rays taken, it was determined there was a crack or perforation in tooth #46 and revealed there was damage to his jawbone. He was told this damage was as a result of the perforation of the tooth during the performance of the root canal. (See paras. 14 and 15 of the affidavit of Kyle Peters, sworn September 8, 2022, hereinafter referred to as the "Peters affidavit")

[11] As required, additional facts relied upon by the parties in advancing their respective positions will be set out or otherwise referred to in these reasons.

## **POSITION OF THE APPLICANT**

[12] The applicant states that pursuant to ss. 14(1) and 15(2) of the ***LAA***, two requirements must be satisfied for an applicant to be granted leave to commence an action outside the applicable limitation period:

a) Not more than 12 months have elapsed between the date on which the applicant first knew of in all the circumstances of the case ought to have known, of all material facts of a decisive character on which the action is based and the date on which the application was made to the court for leave; and

b) The evidence adduced by the applicant would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any defence.

[13] In turning to the first requirement, the applicant states that in considering the "material facts" the legislation imposes a "subjective/objective" test based on an assessment of what is reasonable given the applicant's personal characteristics of intelligence, education and experience.

[14] The applicant further states that the assessment also contemplates a consideration of whether the applicant has obtained "appropriate advice" in respect of the material facts. This advice can be legal, medical or other expert advice and depending upon the circumstances the date of receipt of an expert report has been found to constitute the date that an applicant knew of all the material facts of a decisive character.

[15] The applicant relies on the decision of this court in ***Portage la Prairie (City) v. Tower Engineering Group Limited Partnership***, 2019 MBQB 4, [2019] M.J. No. 5 (QL), where Edmond J. (as he then was) held at para. 51:

> **51** The applicable law and relevant statutory provisions were summarized in my decision of ***Cahill*** as follows …
>
> . . . . .
>
> **27** The requirements on an application for leave were summarized by this court in ***Sochasky v. Winnipeg (City)***, 2013 MBQB 204, [2013] M.J. No. 291 (QL), as follows:
>
> > [22] Taken together, these sections provide that in order to be successful on an application for leave under sections 14(1) and 15(2) of ***The Limitation of Actions Act***, the moving party must:
> > (a) prove by evidence that he or she has a cause of action which, subject to any defence that may be raised, has a reasonable chance of success;

> (b) prove, at the very least, that he or she first learned of a fact material to his or her cause of action within the 12 months next before the application was filed;
> (c) establish that the fact, first learned within that period, is "material" within the sense defined in section 20(2); it must be of "a decisive character" as that phrase is defined in section 20(3);
> (d) establish that the fact must not be one which the applicant ought to have known about earlier.
>
> See ***Einarsson et al. v. Adi's Video Shop et al.*** (1992), 76 Man. R. (2d) 218 at paras. 10-13 (C.A.).

[16] The second requirement, mandated by s. 15(2) of the ***LAA***, is that the court must be satisfied on the evidence of the applicant that a *prima facie* case has been established that would have a reasonable prospect of success.

### *The First Requirement – the knowledge of the material facts*

[17] In respect of the first requirement that the applicant must demonstrate that not more than 12 months have passed from when he knew, or ought to have known, of all material facts of a decisive character on which the proposed action is based, the applicant states that since this application was filed on July 27, 2022, in order to succeed he must demonstrate that he became aware of all material facts of a decisive character on or after July 27, 2021.

[18] The applicant argues that given the nature of the act complained of, the applicant only became aware of the material facts between June 2021 and August 2021. It was during that period that the applicant states he became aware of the crack in tooth #46 and began to experience tooth abscesses.

[19] On September 10, 2021, he was examined by Dr. Brueckner who advised him that he had a crack on tooth #46 and damage to his jawbone. The applicant states

that he was advised by Dr. Brueckner that the crack in his tooth and damage to his jaw was caused by the improper carrying out of the root canal by Dr. Kalvandi.

[20] The applicant states that the 12 months contemplated in s. 14(1) of the ***LAA*** did not start running until September 10, 2021, when he received the advice from Dr. Brueckner regarding the extent of the damage and the causal relationship between the damage and the root canal. Furthermore, he states that upon receiving the advice of Dr. Brueckner, he became aware that an action would have a reasonable prospect of succeeding.

***The Second Requirement – the prima facie case***

[21] The applicant states that he has adduced sufficient evidence to establish a *prima facie* case against the respondents, meaning one that has a reasonable chance of success. He argues that the alleged facts meet the required threshold of substance and being grounded in the evidence.

[22] The applicant states that the evidence contained in the Peters affidavit, in particular the letter and report from Dr. Brueckner, support a *prima facie* cause of action against the respondents as alleged in the draft claim. (See Exhibit A and C attached to the cross-examination on affidavit of Kyle Peters filed October 20, 2023; King's Bench document 10)

## THE POSITION OF THE RESPONDENTS

[23] As the potential liability of the corporate respondent in this matter rests on the application of the doctrine of vicarious liability arising out of the impugned actions of Dr. Kalvandi, both respondents have advanced the same arguments in opposing this

application. Accordingly, in the interests of brevity, I will summarize the position of both respondents jointly.

[24] Furthermore, as it is evident from their arguments and their written material, the respondents do not dispute that the legal issues identified by the applicant in his material are the issues which must be considered by the court in resolving this application. The parties rely on the same general principles set out in the case law in advancing their respective positions. It is the application of those principles to the facts in this case where the applicant and the respondents part ways.

[25] The respondents take the position that the applicant has failed to establish that no more than 12 months between the date applicant knew, or ought to have known of all material facts of a decisive character upon which the proposed action is based, and the date the application was filed. The respondents state that those material facts were known to the applicant on or about August 12, 2019, when Dr. Kalvandi performed the root canal. The applicant knew that the root canal had not gone as planned and was referred to a specialist by Dr. Kalvandi. The respondents state the communication of the material facts is supported by Dr. Kalvandi's chart notes.

[26] In the alternative, the respondents state that all material facts were known to the applicant on June 9, 2022, when he advised personnel at Winnipeg Square that the tooth was bothering him, and he felt there may be a crack in the tooth.

[27] Another argument raised by the respondents is that the application was filed within the two-year limitation period and therefore an extension application was unnecessary. The argument of the respondents in this context is that the limitation period does not begin to run until the dentist-patient relationship terminates. The

termination of the patient-dentist relationship took place on June 9, 2021. (See Exhibit 6 to the cross-examination of the applicant filed October 20, 2023)

[28] The respondents state that it was on June 9, 2021, when the patient-dentist relationship was terminated, only a few months before the applicant claims to have discovered a potential cause of action. As such, the application for relief in respect of the limitation period is not available since all material facts were fully known to the applicant well within the two-year limitation period and accordingly his failure to sue within that limitation period is fatal to his potential cause of action.

[29] The respondents also take the position that the applicant has not established a *prima facie* case in negligence or in breach of contract against Dr. Kalvandi.

[30] Dr. Kalvandi acknowledges that a duty care was owed to the applicant, but that she did not breach the requisite standard of care. The respondents state that the applicant has not adduced evidence of substance to support a cause of action, and in particular, no evidence of substance to support a finding that Dr. Kalvandi breached the standard of care. The respondents state that neither of the two documents prepared by Dr. Brueckner, attached as exhibits A and C to the Peters affidavit, suggest that this was due to a breach of the standard of care or that the procedure was done improperly.

[31] It is the position of the respondents that expert opinion is required to assess issues such as the applicable standard of care and the breach of that standard. The respondents argue that the absence of expert evidence on these issues is fatal to this claim. Furthermore, the respondents argue that attaching the report of Dr. Brueckner

in respect of his opinion regarding the tooth to the Peters affidavit, an affidavit of a non-expert, is improper.

## ANALYSIS AND DECISION

[32] In my opinion, the argument of the respondents in respect of the first issue, the date on which the applicant had knowledge or ought to have known of the material facts of a decisive nature, is not sound.

[33] In this case the facts demonstrate that the applicant did not have knowledge, nor ought he to have known, of the material facts before September 10, 2021. In this respect, I accept the argument of the applicant, that he was not aware, and could not have been aware, that the crack and abscesses were related to the root canal until he received advice from Dr. Brueckner, a root canal specialist on September 10, 2021. In my opinion, the knowledge of the applicant of the material facts as defined at s. 20(2) of the ***LAA***, either actual or on the basis that he ought to have known, was not in place until that date.

[34] In arriving at this conclusion, I have considered and applied the decision of the court in ***Tran Estate v. Moslenko***, 2017 MBCA 47, 413 D.L.R. (4th) 36 (QL), at paras. 22-23 where the court held:

> **22** The statutory discoverability rule has both a subjective and an objective component. The applicant must demonstrate both that she was unaware of the decisive material facts earlier than 12 months before the application was filed and that, in the circumstances, her lack of awareness was objectively reasonable (see *Johnson* at para. 31). Awareness of having a possible cause of action is not to be confused with a party having a complete understanding of the particulars of the cause of action; whether it would, as opposed to could, succeed; or the amount of damages likely (see *Rebizant v Greenwood et al* (1998) 127 ManR (2d) 35 at para 71 (QB); *Johnson* at para 15; *Budd v Cardoso* (1996), 113 ManR (2d) 101 at paras 29-31 (CA); *Munroe v Holder*, 2002 MBCA 39 at paras 32-33; *Swan River Valley Hospital District No 1 v MMP Architects*, 2002 MBCA 99 at paras 20-31; *Lacroix (Guardian of) v Dominique*, 2001 MBCA 122 at para 14; and

> *Winnipeg Condominium Corp No 30 v The Conserver Group Inc et al*, 2008 MBCA 20 at paras 18-22).
>
> **23** The *LAA* recognizes that the nature of the given material facts in a particular case may require a party to seek appropriate advice from a third party as to whether the facts are of a decisive character, for purposes of advancing a claim, before filing his or her application for relief from the limitation period. Hamilton JA explained the relevant principles in the following way in *McIntyre v Frohlich et al*, 2013 MBCA 20 (at paras 57-58):
>
> > Sections 20(3) and (4) of the *Act* impose an "objective/subjective" test based on an assessment of what is reasonable given the applicant's personal characteristics of intelligence, education and experience. This assessment contemplates a consideration of whether the applicant has obtained "appropriate advice" in respect of the material facts.
> >
> > Advice can be legal, medical or other expert advice. Depending on the factual circumstances, the date of receipt of an expert report has been found to constitute the date that a plaintiff knew of all the material facts of a decisive character. See, for example, *Winnipeg Condominium Corp. No. 30 v. Conserver Group Inc. et al.*, 2008 MBCA 20, 228 Man.R. (2d) 30, in which M.A. Monnin J.A. wrote (at para. 22):
> >
> > > I do not, by any stretch, wish to state that in every case the requirements of s. 14(1) of the **Act** require that a putative plaintiff obtain expert evidence to buttress its position, but in this case it was necessary to satisfy the "decisive character" requirement of the **Act**.

[35] I agree with the applicant that given his personal characteristics, intelligence and experience, he did not know with any certainty that there was a crack in his tooth until he received advice from Dr. Judge at Greenwoods on September 7, 2021. I also agree that it was not reasonable for him to know that the crack and abscesses he was experiencing were a result of the root canal until he says Dr. Brueckner provided him with an opinion on September 10, 2021 to that effect.

[36] I do not accept the position of the respondents that the limitation period in this case did not commence running until the termination of the patient-dentist relationship on or about June 9, 2021. This argument advances the position that "professional services … in the matter complained of" (see s. 44 of the ***DAA***), include all services

provided to the applicant by Dr. Kalvandi and Winnipeg Square until the termination of the dentist-patient relationship.

[37] I find that the decision of the court in ***Shmon v. Manitoba (Public Trustee)***, 1999 CanLII 14530 (MB KB), addresses this argument in the applicant's favour. In ***Shmon***, the court held that the professional services contemplated by s. 44 of the ***DAA*** are those "which give rise to the claim". The court held at para. 9:

> [9] The claim against the estate is primarily grounded in negligence and malpractice which are the causes of action covered specifically in s. 44 of the ***Dental Association Act***. That means that an action against Dr. Bertalan or his estate must be commenced within two years from the date when the matters complained of, namely, the professional services rendered, were terminated. The professional services addressed by the section are those which give rise to the claim. The claim is for damages of one kind or another arising from the work of Dr. Bertalan on the plaintiff, prior to the end of January 1994. By the end of January 1994, that work had terminated. The plaintiff's counsel argued that the follow up appointment for July 1994 indicates the work remained ongoing but I do not agree. That appointment was to check on work performed and as described in the statement of facts was simply a "follow up". In any event, at the very most, in all the circumstances, including the May 1994 death of Dr. Bertalan, his professional services were concluded no later than the end of July 1994.

[38] Similarly, in the case at bar, the professional services provided by the respondents after August 12, 2019 (the date of the root canal), were not related to the root canal or follow-ups with respect to the root canal. They were appointments for various unrelated dental services. If I were to accept the respondents' argument it would mean that in any other ongoing patient-dentist relationship the commencement of a limitation period would not commence until the relationship was terminated, even if a specific procedure complained of occurred decades ago. It would mean that there is no limitation period for dentists if the patient continues to see the dentist and attend at a dental clinic, regardless of the reason for their attendance.

[39] The decisions relied upon by the respondents in advancing this position are distinguishable. In particular, in ***Sehon v. Miller***, 1995 CarswellMan 512, [1995] M.J. No. 364 (QL), the court was dealing with a claim for damages arising out of the defendant's provision to the plaintiff of psychiatric services and treatment over a period of approximately seven years. In ***Sehon***, the plaintiff alleged that the defendant took advantage of and exploited the doctor-patient relationship. The court held at para 12:

> **12** … In the subject action the defendant provided psychiatric services to the plaintiff on an on-going basis. **This is different than performing surgery or conducting a physical examination**…It is perhaps trite to say that there are certain complexities associated with the relationship between a psychiatrist and patient and in light of the damages which the plaintiff has alleged that she has suffered as a result of this relationship, I am satisfied that the court will have to consider all of the conduct of the defendant over the full course of the professional relationship ...
>
> (emphasis added)

[40] In the case at bar, it is the services of the dentist in respect of the root canal that are the substance of the complaint, and the evidence is clear that there is no further treatment or related services performed in respect of the root canal after August 12, 2019. It is on that date that the limitation period began to run. Accordingly, the plaintiff was outside of the limitation period when this application was commenced, but within the 12-month period after the expiry of the limitation period. Accordingly, the application to extend the limitation period was brought within the appropriate time frame.

[41] Turning to the second issue, whether the applicant has advanced evidence sufficient to support a *prima facie* case, the evidence relied on by the applicant is found in the Peters affidavit and the cross-examination of the applicant on that affidavit. In particular, the affidavit attaches two exhibits, exhibit A and C, which the applicant

states meet the evidentiary requirements of establishing a *prima facie* case in conjunction with the statements of the applicant in his affidavit and various medical chart notes prepared by Dr. Kalvandi. Those notes are found at various exhibits, including exhibit 4, filed at the cross-examination of the applicant.

[42] Exhibit A to the Peters affidavit is a letter from Dr. Brueckner to the respondents dated September 24, 2021, approximately two weeks after his examination of the applicant. The entirety of the substantive portion of that letter provides:

> Mr. Kyle Peters received endodontic treatment on tooth #46.
>
> Procedure created perforation involving the chamber floor with extruded gutta percha into furcation.
>
> CBCT revealed large cancellous bone defect tracking from mesial apex into furca; perforated buccal cortical plate.
>
> Retreatment has poor prognosis
>
> Advised exo #46
> Consider re-imbursing patient treatment fee as well as covering all costs for future replacement due to the iatrogenic damage
>
> Mr. Peters awaits your call
>
> Dr. Drew Brueckner
> Endodontist

[43] Exhibit C to the Peters affidavit is a response to a letter sent by counsel to the applicant requesting that Dr. Brueckner provide a detailed dental/medical-legal report. The letter of counsel for the applicant to Dr. Brueckner is dated October 21, 2021, and is attached as exhibit B to the Peters affidavit. It is instructive to reproduce the substantive portion of Exhibit B, setting out the requests made of Dr. Brueckner by counsel. Exhibit B provides:

> We would appreciate if you could provide us with a detailed dental/medical legal report commenting on the following:
>
> 1. the period of time over which you have provided treatment to Mr. Peters;
> 2. Mr. Peters' initial complaints with respect to the Root Canal and relevant dental and medical history, including pre-Root Canada history;
> 3. Mr. Peters' current injuries, symptoms, and dental, medical or oral health conditions;
> 4. your diagnosis and opinion on the extent of Mr. Peters' injuries, symptoms, and dental, medical and oral health conditions;
> 5. whether, in your opinion, the injuries, symptoms, and dental, medical and oral health conditions are attributable to the Root Canal, including whether same were more likely than not caused by, contributed to, or aggravated by the Root Canal;
> 6. the presence, if any, of physical limitations, impairments or continuing disability, including a description of the limitations or restrictions on Mr. Peters;
> 7. the permanence of any physical limitations, impairments, or continuing disability;
> 8. your prognosis; and
> 9. details regarding the nature and frequency of any future care or treatment you recommend, including future dental or medical procedures. …

[44] The substantive reply by Dr. Brueckner to the requests set out in Exhibit C to the Peters affidavit is as follows:

> I will present the pertinent information as it pertains to the case.
>
> I examined Kyle October 10th 2021 for an endodontic consult from Dr. Arpanir Judge DMD.
>
> Concern was what appeared to be a perforation of the pulp floor associated with tooth #46 and filling material was extruded into the supporting bone. The endodontic treatment was provided at Winnipeg Square Dental just recently.
>
> I confirmed this with a CBCT scan to view tooth in 3 dimensions.
>
> There was bone loss tracking from the root ends up to the perforation. With this amount of extensive bone loss, tooth #46 was deemed hopeless to retain and required extraction.
>
> I explained the unfortunate prognosis to Mr. Peters and he understood.

> I emailed a letter to Winnipeg Square Dental indicating my findings and recommendations to have tooth #46 extracted and the patient should be reimbursed for the fees charged and consider costs of future replacement. I did not receive a reply.
>
> I had asked Kyle to contact that clinic and discuss my recommendations. I am unsure if there was any future communication.
>
> This situation is not debilitating or will cause future impairments regarding health.
>
> Professionally,
> Dr. D. Brueckner
> DMD, CERTIFIED ENDODONTIC SPECIALIST

[45] In addition to Exhibits A and C to the Peters affidavit, the applicant relies on the chart notes of Dr. Kalvandi and Winnipeg Square. In addition to various chart note entries related to the motor vehicle accident that the applicant was involved in, there is a note created on August 12, 2019, related to tooth 46 (see exhibit 4 of the cross-examination of Kyle Peters) which provides as follows:

> Teeth 46
> Endo,
> 46 Endo was perforated. Was noted on final PA. Informed patient that it did not go as planned. Distal root did have heavy decay. Informed patient tooth may not be salvageable.
> Pt understood. Will follow-up with specialist, but said "If it start to hurt will follow-up with the specialist."
>
> . . .
>
> Referral Dr, Rebizant, assess if 46 can be repaired.

[46] Further in the same exhibit to the cross-examination of the applicant, in notes of the same date related to "Endo" under the subheading "Referral" it is again noted:

> Referral:
> As follows:
> Dr. Rebizant, can 46 be saved. Perforation.

[47] The applicant submits that he has met the evidentiary burden of establishing a *prima facie* case and that it is not necessary that the expert opinion assess issues such as the applicable standard of care and breach of that standard at this stage. The applicant, it is submitted, need only establish that his claim is not based upon "mere conjecture or speculation".

[48] In support of this proposition the applicant relies upon ***Fawcett-Neufeld v. Kaatz Construction Ltd.***, 2023 MBKB 36, [2023 M.J. No. 54 (QL), in which the court holds at paras. 40 and 46:

> **40** At this stage I am not required to determine the likelihood of success of any of the allegations of the applicant on a balance of probabilities. I am satisfied that the proposed claim is not based upon mere conjecture or speculation. The claim is based upon the opinions of a number of experts who have inspected the premises and prepared reports outlining their findings. These reports, in my view, meet the threshold of establishing a *prima facie* case.
>
> . . . . .
>
> **46** The onus on the applicant at this stage is to establish that her proposed claim is not based on speculation and conjecture. She has done that by obtaining independent opinions on the issues with respect to the design and construction of the foundation and potential moisture and health issues any such defects pose. She is not required to prove her claim at this stage, but rather to demonstrate that it has a reasonable prospect of success.

[49] Furthermore, the applicant takes issue with the respondents' position that the letter and report of Dr. Brueckner (exhibits A and C of the Peters affidavit respectively) are not properly before the court and ought not be considered on this application as they are inadmissible on the basis of the rules against the admission of hearsay evidence. The applicant states that the ***Fawcett-Neufeld*** decision provides the requisite authority for the admissibility of the impugned letter and report. The applicant

relies on the following findings from para. 47 of the ***Fawcett-Neufeld*** decision in advancing this proposition:

> **47** With respect to the evidence that the condition of the home is particularly dangerous to her daughter who suffers from asthma, I accept the applicant's evidence that she was sufficiently concerned that she moved her daughter out of the home. With respect to the hearsay evidence as to her doctor's opinion, the materials site the source for this opinion and, as such the evidence is admissible (see ***Laing*** para. 64). With respect to the weight I have attributed to this evidence, it was one factor I considered, along with all of the other evidence, to determine that the applicant has established a *prima facie* case. However, even without this evidence I am of the view that there was sufficient evidence upon which to grant leave to file a claim.

[50] The respondents take issue with the applicant's position that the letter and the report, along with the other material submitted by the applicant can establish a *prima facie* case. They submit that to establish a *prima facie* case against Dr. Kalvandi or anyone for whom the applicant alleges Winnipeg Square is vicariously liable in the performance of dental treatment, the applicant must put forward expert evidence opining on the applicable standard of care and how it was breached.

[51] The respondents rely on the decision of Steel J. (as she then was), in ***Rebizant v. Greenwood***, [1998] 127 Man.R. (2d) 35, [1998] M.J. No. 142 (QL), in which the evidentiary requirements of this kind are set out as follows:

> **134** The Limitation of Actions Act requires by section 14(1) that relief be sought "on application". An affidavit based on information and belief is not sufficient on an application. For example, with respect to Ms. Beaulieu, the only evidence adduced by the plaintiff that she suffered damage and that the damage was caused by the implant are two paragraphs contained in the plaintiff's affidavit repeating information given to her by Dr. Chimilar. No affidavit from Dr. Chimilar is filed.
>
> . . . . .
>
> **138** The second condition for the admitting of evidence based on information and belief on applications, as opposed to motions, is that the facts deposed to must not be contentious. (See Stadelmier v. Hoffman (1986), (sub nom. Re

> Becker) 57 O.R. (2d) 495 (Ont. Sun. Ct.) at p. 500 and see Beatty v. Megill-Stephenson Co., at p. 47.)
>
> **139** Evidence in affidavits is to be confined to facts within the personal knowledge of the deponent or to other evidence the deponent could give if testifying in court. This means that if a deponent is giving evidence characteristically referred to as "expert evidence" or "opinion evidence", the deponent must be properly qualified as an expert before such evidence is given, or such opinion is expressed, in the affidavit.

[52] The respondents also cite the decision of Dewar J. in ***Benson v. Manitoba (Workers Compensation Board)***, 2013 MBKB 129, 293 Man.R. (2d) 42 (QL), where he held:

> **50** There is no evidence which Mr. Benson has provided which shows that the three doctors acted below the requisite standard expected of them. He has provided a letter from Dr. Berrington which obliquely opines that an unstable spine is often associated with the condition apparent on reading the x-rays taken in British Columbia. However, as I have earlier referenced, that deals with the work done by Dr. Padilla, not the three doctors who Mr. Benson wishes to name in this proceeding. There is no information contained in Mr. Benson's application about the proper standard of care for the Manitoba doctors, nor any explanation why he has not supplied any.
>
> **51** When dealing with a medical negligence case, the fact that there has been an unfortunate outcome following medical treatment does not necessarily demonstrate that a doctor has been negligent. In my view, unless it is a clear case (which this is not), the better course for any applicant seeking an extension of the limitation period to sue a doctor should include some medical evidence about the standard of care alleged to have been disregarded by the proposed defendant. Without such evidence, it is virtually impossible for a court to conclude that the proposed case has a reasonable prospect of success.
>
> **52** It is important for an applicant to put his best foot forward at this stage of the litigation because the proposed defendants are not entitled to adduce much evidence on the merits of the proposed claims against them (See ***Manitoba Hydro Electric v. John Inglis Co.*** (2000), 142 Man.R. (2d) 1 (C.A.), [1999] M.J. No. 506, at para. 21. Given the evidentiary limitations upon the proposed defendants, it is not unreasonable to insist that an applicant should do more on an application like this than simply ask the court to assume that the proposed defendants have breached a standard of care. I am not prepared to conclude that Mr. Benson has demonstrated that he has a case against Dr. Doermer, Dr. Bay and Dr. Kress which has a reasonable prospect of success. To conclude otherwise would be speculation.

[53] Finally, in support of this position, the respondents cite ***Laing v. Sekundiak***, 2015 MBCA 72, 319 Man.R. (2d) 268 (QL), where the court held at paras. 72-73:

> **72** The fundamental difficulty for the applicant is, as the application judge wrote (at para. 88):
>
> > … [T]here is essentially no evidence of how a prudent and diligent doctor, possessing a reasonable level of knowledge at the time, competence, and skill, in that field would have conducted himself or herself in the same circumstances as [the respondent]. …
>
> **73** The application judge was not obliged, as argued by the applicant, to infer that the respondent breached the duty of care by using the ABC system during the surgery. I see no error in how the application judge approached his analysis with respect to the proposed cause of action in negligence for breach of the duty of care either in principle or in fact. His conclusion that the applicant had not demonstrated a reasonable chance of success for her proposed claim in negligence for breaching the duty of care is a question of mixed fact and law, and as such, is entitled to deference.

[54] Quite apart from the hearsay objection and the alleged impropriety of attaching Dr. Brueckner's letter and report as exhibits A and C to the Peters affidavit, the applicant here faces the same difficulties set out in the foregoing authorities relied upon by the respondents. I agree with the respondents that neither the letter of Dr. Brueckner dated September 24, 2021 or the letter from Dr. Brueckner to the applicant's counsel summarizing his findings (Exhibits A and C of the Peters affidavit respectively), meet the applicable standard of establishing a *prima facie* case in respect of the applicable standard of care in performing the root canal, how it was that this standard was not followed or met, or even whether Dr. Bueckner is of the opinion that the standard was or was not met. Even considering the other evidence relied upon by the applicant, it is my conclusion that there is essentially no evidence how a prudent and diligent dentist, possessing a reasonable level of knowledge, competence and skill

in that field would have conducted themselves in the same circumstances as Dr. Kalvandi when performing the root canal on August 12, 2019.

## **CONCLUSION**

[55] Based on the foregoing reasons, I find the applicant has demonstrated that not more than 12 months have elapsed between learning of all material facts of a decisive nature and the commencement of the application. However, the applicant has not meet his evidentiary burden of demonstrating he has a *prima facie* case against the respondents. Accordingly, the requested relief is denied, and the application is dismissed with costs on the applicable tariff in favour of the respondents.

_____ J.