



### F41 *The Queen vs. J.A.A.: Fresh Evidence Appeal in the Supreme Court of Canada Results in Granting of a New Trial in a Bitemark Case*

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After attending this presentation, attendees will have a better understanding of: (1) why it is imperative that an expert in bitemark analysis examine all cases of purported bitemark injuries prior to cases entering the judicial system; (2) why the concept of a *Palmer* ruling and why post-trial introduction of bitemark expert evidence as “fresh evidence” is not, and should not be, necessarily automatically allowed; (3) how the forensic community must work cooperatively with prosecuting and defense counsel and police in instances where problematic evidence has been proffered; and, (4) how to make any submitted *curriculum vitae* as succinct and factually accurate as possible to prevent embarrassment to both the expert and the attorney that retained him/her.

This presentation will impact the forensic science community by providing law enforcement and children’s social services with the impetus to adequately document and investigate bitemark cases and to engage an appropriately trained expert to evaluate case material at the appropriate juncture — prior to the appellate process.

Original imaging evidence, which will be presented, will illustrate that the accused (J.A.A.) was charged with assault after allegedly sexually assaulting his ex-wife (S.A.), with whom he lived in the matrimonial home. It was alleged, in the course of the assault, that the complainant had bitten the accused across his finger as hard as she could. The accused was apprehended, photographed, and a police officer testified at trial that the mark on J.A.A.’s finger was a human bitemark. The accused was convicted by the judge who, in his ruling, used the bitemark evidence as corroboration of the complainant’s story. J.A.A. was, based partly on the bitemark evidence, sentenced to penitentiary time. On appeal, the prosecution obtained the opinion of a non-certified forensic odontologist that buttressed the policeman’s testimony stating that the marking was indeed a bite mark. Contact was made by the appellate law firm for an opinion on the case, and later, an examination of the credentials, and assistance for the defense in matters relating to the credentials of the prosecution expert. This was done prior to submission of the case to the Provincial Court of Appeals for admission of fresh evidence — the expert evaluation of the bitemark by the defense.

In the this jurisdiction, there is a three-step assessment of bitemark cases. The first step, after the examination of the material, is to determine whether the injury at issue is indeed a bitemark. It was the opinion of the prosecution expert that the injury was from a human tooth — most likely a cuspid tooth. The defense expert testified that the injury was not a bitemark. At the Provincial Court of Appeals, an argument by post-conviction defense counsel that the report of the expert stating that the marking was *not* a bitemark should be allowed as fresh evidence. The bar for hearing fresh evidence is high to prevent courts trying cases on multiple occasions. In the course of the cross-examination of the prosecution witness, it was evident that there were major issues with that person’s submitted *curriculum vitae*, resulting in a detailed cross-examination of over 90 minutes and ultimately withdrawal of this expert’s report and testimony. Despite this, the appeal was denied in a 2:1 decision by the Provincial Court of Appeals and the case was ultimately heard by the Supreme Court of Canada. At the Supreme Court of Canada, the defense appealed that the new evidence — that what was originally thought to be a bitemark at trial was not — should be evaluated by the trier of fact and that the accused be permitted a new trial. In *Palmer vs. the Queen* (1980), the Supreme Court of Canada ruled that in order for fresh evidence to be allowed post-conviction, four criteria need to be considered: (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial; (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (3) the evidence must be credible in the sense that it is reasonably capable of belief; and, (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. Before the court, the Crown prosecutor conceded that points 2 and 3 had been met so the appeal centered upon points 1 and 4.

The majority, led by Justice Charron, found that the defense had not met the due diligence criterion, but essentially agreed to excuse this, given that the Crown, too, had not introduced expert evidence regarding the bitemark. Justice Charron focused on the fourth criterion, setting up the trial judge’s decision as a “close call” between the competing testimonies of S.A. and J.A.A., with the presence of singular pieces of corroborative evidence, such as the bitemark, pushing the judge over the line beyond any reasonable doubt. Justice Charron maintained that the fresh evidence would remove vital corroborative



## Jurisprudence Section - 2014

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evidence and undermine the credibility of S.A.'s testimony, particularly the segment about having bitten J.A.A. This was sufficient to reasonably expect that the defense expert evidence — that the marking on the skin of the accused — was *not* a bitemark — would affect J.A.A.'s verdict. On the basis of the Supreme Court ruling, a new trial was ordered. This trial never occurred and the defendant is a free man today, albeit substantially poorer and perhaps wiser. Attendees will see the documentary evidence on which the police “expert” and prosecution expert determined that the injury was a bitemark and on which the defense expert maintained that the injury was not a bitemark so that attendees may make their own determination.

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### **Bitemark, Appellate, Supreme Court**