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## **Criminal Law - First Complaint Doctrine Applies to Defendant in a Sexual Assault Prosecution - Commonwealth v. Mayotte, 56 N.E.3D 756 (Mass. 2016)**

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**CRIMINAL LAW—FIRST COMPLAINT  
DOCTRINE APPLIES TO DEFENDANT IN A  
SEXUAL ASSAULT PROSECUTION—  
*COMMONWEALTH V. MAYOTTE*, 56 N.E.3D 756  
(MASS. 2016)**

In an effort to protect sexual assault victims from being stereotyped by jurors because of when or to whom they report sexual assault to, the Supreme Judicial Court of Massachusetts (“SJC”) created the first complaint doctrine.<sup>1</sup> The first complaint doctrine allows testimony from the first recipient of a complainant’s (victim) first complaint of sexual assault.<sup>2</sup> In *Commonwealth v. Mayotte*,<sup>3</sup> a case of first impression, the SJC considered whether a defendant in a sexual assault prosecution may use the first complaint doctrine to show that he or she was the victim of sexual assault rather than the perpetrator.<sup>4</sup> The court ultimately held that the first complaint doctrine is a neutral rule of evidence that may be used by either party when an allegation of sexual assault is at issue.<sup>5</sup>

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<sup>1</sup> See MASS. GUIDE EVID. § 413 (setting forth first complaint doctrine); *Commonwealth v. King*, 834 N.E.2d 1175, 1181 (Mass. 2015) (“In light of changed circumstances . . . we substantially revise the doctrine, which in the future shall be called the ‘first complaint’ doctrine.”). “[J]urors may still believe that a rape victim will promptly disclose a sexual assault to someone; that jurors may draw adverse inferences from the absence of evidence suggesting such a prompt complaint; and that jurors continue to be skeptical of allegations of rape.” *King*, 834 N.E.2d at 1188-89.

<sup>2</sup> See *King*, 834 N.E.2d at 1181 (describing scope of admissible testimony by first complaint witness). The first complaint witness may testify about:

[T]he circumstances surrounding the making of that first complaint. The witness may also testify about the details of the complaint. The complainant may likewise testify to the details of the first complaint (i.e., what she told the first complaint witness), as well as why the complaint was made at that particular time.

*King*, 834 N.E.2d at 1181; MASS. GUIDE EVID. § 413 (West 2016) (setting forth admissible testimony under first complaint doctrine).

<sup>3</sup> 56 N.E.3d 756 (Mass. 2016).

<sup>4</sup> See *id.* (“Because the application of the first complaint doctrine to a defendant in a rape prosecution is a question of first impression, we granted the defendant’s application for direct appellate review of all her claims.”).

<sup>5</sup> See *id.* at 767 (holding first complaint doctrine is neutral rule of evidence). “We conclude that a defendant may proffer first complaint evidence where the defendant claims to be the victim of sexual assault and that claim is a live issue in the case.” *Id.*

Linda and Joseph Mayotte married in 1987, and after years of trying to conceive a child of their own, they decided to adopt.<sup>6</sup> In 2004, the Mayottes welcomed into their home their newly adopted children from an orphanage in Kazakhstan.<sup>7</sup> The adopted children are siblings and at the time of the adoption, the children D.M. and V.M. were twelve and eight years old respectively.<sup>8</sup> D.M. struggled in school and began having chronic stomach pains from what was later diagnosed as a gallbladder condition.<sup>9</sup> The defendant, Linda Mayotte, would massage his stomach and beginning in January of 2005, started initiating sexual contact with D.M.<sup>10</sup> D.M. never told anyone about the sexual abuse.<sup>11</sup>

In addition to the sexual abuse of D.M. by Mayotte, V.M. was also being sexually abused by Mayotte's husband, Joseph.<sup>12</sup> In June of 2007, V.M. told neighbors that her father, Joseph, was touching her "private areas."<sup>13</sup> The Department of Children and Families (DCF) was called and a police officer and social worker were sent to the home to investigate the report.<sup>14</sup> Both children denied sexual abuse upon being asked.<sup>15</sup> In April of 2009, V.M. told D.M.'s girlfriend about the sexual abuse and once again, DCF was called to investigate the claims.<sup>16</sup> When D.M. was asked by DCF representatives if he was being sexually abused, he once again

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<sup>6</sup> See *id.* at 760 (explaining background of defendant's marriage and adoption).

<sup>7</sup> See *id.* (explaining background of adopted children).

<sup>8</sup> See *Mayotte*, 56 N.E.3d 756, 760 (explaining history of defendant's children).

<sup>9</sup> See *id.* (explaining history of plaintiff, D.M.).

<sup>10</sup> See *id.* (describing how sexual abuse of D.M. began). "The defendant would massage his stomach to help him sleep." *Id.* "According to D.M., sexual contact occurred more than one hundred times between January, 2005, and the spring of 2007." *Id.*

<sup>11</sup> See *id.* at 760-61 (stating D.M. never made complaint of sexual abuse). The facts state that

"during this time, D.M. made no complaint of sexual abuse to the social worker who conducted home visits on behalf of the adoption agency or the counsellor he saw for twelve sessions. *Id.* "D.M. did not disclose the alleged abuse to his best friend or even his sister, V.M." *Id.*

<sup>12</sup> See *id.* at 760 (disclosing sexual abuse of V.M. by defendant's husband).

<sup>13</sup> See *Mayotte*, 56 N.E.3d at 761 (reporting of sexual abuse by V.M. for first time).

<sup>14</sup> See *id.* (beginning of sexual abuse investigation by authorities). The Department of Children and Families conducted an investigation by asking "[e]ach child . . . separately if he or she had been or were being inappropriately touched by a parent." *Id.*

<sup>15</sup> See *id.* (denying sexual abuse during investigation by DCF for first time). D.M. never disclosed the sexual abuse to the police officer or the DCF social worker that was sent to his home. *Id.*

<sup>16</sup> See *id.* (reporting of sexual abuse by V.M. for second time).

denied the allegations.<sup>17</sup> On June 4, 2009, D.M. made his first complaint of sexual assault.<sup>18</sup>

During Mayotte's trial, as part of her defense, she testified that she did not rape D.M. but claimed that she was the victim of sexual assault and not the perpetrator.<sup>19</sup> Mayotte's attorneys filed a pre-trial motion to present first complaint testimony.<sup>20</sup> Mayotte claims that the reason why she waited so long to make a first complaint was because of the threats made to her by D.M.<sup>21</sup> The Superior Court found that Mayotte's first complaint evidence was inadmissible as a matter of law and excluded the evidence.<sup>22</sup> A jury convicted Mayotte of rape of a child, indecent assault and battery on a child under the age of fourteen, and other offenses arising from the sexual abuse.<sup>23</sup> Mayotte filed an application for direct appellate review after being

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<sup>17</sup> See *id.* (denying sexual abuse during investigation by DCF for second time). DCF began a second investigation. See *id.* During a visit to the home by social workers in May of 2009, D.M. again denied the allegations of sexual abuse. *Id.*

<sup>18</sup> See *Mayotte*, 56 N.E.3d at 761 (describing D.M.'s first complaint of sexual assault). Two years after the sexual abuse began, D.M. made his first complaint of sexual assault. *Id.* On June 4, 2009, Mayotte sent D.M. a text message threatening to report him to the police for stealing her jewelry. *Id.* Upset over the message, D.M. told his girlfriend about the sexual abuse. *Id.* In response, his girlfriend pressed him to disclose the abuse to the authorities. *Id.* After notifying authorities, DCF removed D.M. and V.M. from the home. *Id.*

<sup>19</sup> See *id.* (describing defendant's allegation of sexual abuse by D.M.). Mayotte alleges that D.M. was sexually aggressive towards her beginning in 2005. *Id.* Mayotte further alleges that D.M. used physical force and threats to "force her participation in sexual acts with him." *Id.* Mayotte testified that "D.M. threw her down on the bed and pinned her arms to her body; grabbed her arm and forced her to the bed; and threw her against a bureau after she bit him while attempting to get away." *Id.*

<sup>20</sup> See *Mayotte*, 56 N.E. 3d at 761 (noting defendant's motion to allow first complaint testimony). "The defendant filed a pretrial motion to present 'first complaint' testimony from Kassor, in support of her theory of defense that D.M., 'wise beyond his years,' raped the defendant and controlled her behavior by threatening to make a false allegation of rape." *Id.*

<sup>21</sup> See *id.* (noting defendant never complained of sexual assault). Mayotte claims that she did not make a first complaint of sexual assault for almost five years because of the ongoing threats made by D.M. *Id.* "As for the alleged threats, the defendant testified that D.M.'s 'favorite' threat was that he would 'go to the police and say that [she] was raping him.' According to the defendant, D.M. made this threat '[e]very time he didn't like [the defendant's] reaction' to his advances." *Id.*

<sup>22</sup> See *id.* at 761-62 (excluding evidence of first complaint). The Superior Court judge denied Mayotte's motion to present first complaint evidence. *Id.* at 761. The judge stated that:

[T]he first complaint protocol and doctrine [were] not to curb any abuses of defendants being prejudiced by not explaining themselves. They don't have to explain themselves. The law doesn't require it, and every judge instructs a jury that they do not have to explain themselves. So there's no prejudice if she never made a statement.

*Id.* at 761-62.

<sup>23</sup> See *id.* at 759 (detailing conviction of Mayotte). Mayotte was convicted of "rape of a child, indecent assault and battery on a child under the age of fourteen, indecent assault and battery on a child over the age of fourteen, incest, reckless endangerment of a child, intimidation

convicted, part of which was due to the denial of presenting first complaint evidence during trial.<sup>24</sup> The SJC ultimately held that first complaint evidence is admissible as a matter of law, even for a defendant, whenever the credibility of a sexual assault allegation is at issue in the trial.<sup>25</sup>

Dating back to English common law, a victim's credibility was questioned if they did not complain of, or report, a sexual assault promptly after its occurrence.<sup>26</sup> Yet, if the victim did complain of the sexual assault

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of a witness, resisting arrest, and unlawful possession of a firearm without a firearm identification card." *Id.* (citations omitted).

<sup>24</sup> See *id.* at 759-60 (challenging conviction on appeal). Mayotte challenges her convictions by stating:

(1) [E]rror in the exclusion of first complaint evidence relating to her defense that she was the victim, not the perpetrator, of rape by the complainant; (2) error in the exclusion of a statement proffered as evidence of the victim's state of mind; and (3) insufficiency of the evidence to prove the reckless endangerment indictment based on "serious bodily injury."

*Id.* at 760.

<sup>25</sup> See *Mayotte*, 56 N.E.3d at 762-764 (holding first complaint evidence is neutral rule which may be used by either party). "We agree with the defendant that the first complaint rule is a neutral rule of evidence, applicable whenever the credibility of a sexual assault allegation is at issue." *Id.* at 762. The SJC reasoned that first complaint evidence must be a neutral rule because "one-sided evidentiary rules are inherently unfair." *Id.* at 764. Despite determining that first complaint evidence is a neutral rule, the SJC found that Mayotte was unprejudiced by the denial of first complaint evidence. *Id.* The court stated:

[R]eviewing the error under this standard, we discern no prejudice to the defendant. The defendant's proffer did not specify any details of the proposed testimony. The sole reference to the substance of the testimony was as follows: "This testimony would be elicited from Edward Kassor, a close friend of [the defendant's]." In the absence of any necessary details, this proffer would have had little or no probative value as first complaint testimony. Had the judge considered the proffer, rather than denying it as a matter of law, clarification would have been required. Further inquiry would have revealed the defendant's equivocal statement to the police that she 'tried to tell [her] friend Ed,' which falls short of an affirmation that she did in fact disclose the alleged rape by the complaining witness.

*Id.* (citation omitted).

<sup>26</sup> See Andrea R. Barter, *SJC Revisits and Revises the Fresh Complaint Rule*, MASS. BAR ASS'N. L. J. (Nov. 2005), <http://www.massbar.org/publications/lawyers-journal/2005/november/sjc-revisits-and-revises-the> (discussing misconceptions of sexual assault victims). English common law "called into question the credibility of a victim of violent crime unless he or she had told someone about the incident right away." *Id.* It was common for jurors to evaluate a victim of sexual assault based on when the assault was reported. *Id.* If too much time elapsed between the assault and the complaint, then it was assumed the victim was lying. *Id.* The bias that jurors and society as a whole impose on sexual assault victims is outdated, and as one attorney conveys "[t]he concept of 'hue and cry' as the only way to verify whether a sexual assault complaint is real is a bankrupt idea." *Id.* Juror bias is further described by Barter, who states:

to someone, the statements of that complaint were not allowed because of hearsay rules.<sup>27</sup> To deal with the admissibility issue of such statements, Massachusetts created the fresh complaint doctrine.<sup>28</sup> The fresh complaint doctrine allowed testimony from the witness whom the victim complained to about the sexual assault, but only if the complaint was made “freshly” or “promptly” after the sexual assault.<sup>29</sup> The fresh complaint doctrine only allowed testimony that met the requirement of “freshness” or “promptness”, thus preserving the misconception that a victim’s credibility depended on when the victim complained of the sexual assault.<sup>30</sup>

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[S]ome jurors may continue to believe incorrectly that “real” victims will promptly disclose a sexual attack. Some jurors may continue to harbor prejudicial misperceptions about the nature of rape, rape allegations and those who make rape allegations. Victims may delay complaining about sexual assaults but then face claims of fabrication; the reasons for the behavior of victims of sexual assault are still widely misunderstood.

*Id.*

<sup>27</sup> See Barter, *supra* note 26 (explaining that testimony is excluded because of other evidentiary rules). “However, statements that victims make to third parties about what happened to them are generally considered hearsay and are not admissible as evidence in court proceedings.” *Id.* The lack of such statements because of hearsay rules places victims at a disadvantage before a jury. *Id.*

<sup>28</sup> See *id.* (beginning of fresh complaint doctrine). While the fresh complaint doctrine dates back to English common law, Massachusetts had its own. *Id.* “Massachusetts’ fresh complaint doctrine admitted into evidence a sexual assault victim’s out of court complaint when seasonably made. The purpose of the doctrine is to corroborate the victim’s testimony, which may be susceptible to disbelief where the victim has failed to file a prompt complaint.” *Id.* “The fresh complaint doctrine allows rape victims who do complain promptly to eliminate any unwarranted skepticism . . . .” *Id.*

<sup>29</sup> See *id.* (describing probability of untruthfulness as more time elapses between sexual assault and complaint). The fresh complaint doctrine has “a requirement of ‘promptness’ or ‘freshness.’” *Id.*

<sup>30</sup> See *id.* (stating fresh complaint doctrine did not resolve problem of basing credibility on timeliness of complaint). The fresh complaint doctrine put a spotlight on the timeliness of when a sexual assault victim complained of the assault and, therefore, the SJC stated:

[A] requirement of “promptness” or “freshness” may, in fact, exacerbate the very misunderstandings the fresh complaint rule aims to counteract – that those victims who report “freshly” are inherently more credible than those who report at a later time – and contradicts the present understanding that victims often do not promptly report a sexual assault for a variety of reasons that have nothing to do with the validity of the claim of assault.

*Id.*

In addition, the court acknowledged that at a minimum, the promptness requirement places the imprimatur of the court on the misimpression that most “real” victims raise an immediate “hue and cry.” *Id.* At worst, the rule rewards perpetrators who are especially brutal or threatening during and after an assault, and thereby successfully procure their victims’ prolonged silence. *Id.*

In 2005, the SJC reconsidered the fresh complaint doctrine; and after substantial revisions, it renamed the doctrine as the “first complaint doctrine.”<sup>31</sup> The first complaint doctrine allows for testimony from the first person who was told about the sexual assault, regardless of how prompt or

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<sup>31</sup> See *Commonwealth v. King*, 834 N.E.2d 1175, 1181 (Mass. 2005) (announcing first complaint doctrine after finding problems with fresh complaint doctrine). In *Commonwealth v. King*, the defendant was convicted of forcible rape of a child. *Id.* The victim told her mother about the sexual assault sometime between the day after it happened and one week later. *Id.* at 1182. The victim’s mother reported the sexual assault to the District Attorney’s Office who then spoke with Detective Erin Kerr of the Brockton Police Department. *Id.* The victim’s “mother and Detective Kerr testified as ‘fresh complaint’ witnesses” during the trial. *Id.* The purpose of admitting this testimony was to corroborate the victim’s own testimony regarding the sexual assault. *Id.* at 1181. The defendant argued the judge erred by allowing the testimony of both witnesses (the victim’s mother and Detective Kerr) under the fresh complaint doctrine because the testimony “exceeded the bounds of the fresh complaint doctrine.” *Id.* at 1183. The defendant argued the testimony of the witnesses was not fresh because the victim first told her mother of the assault sometime between one and seven days later; thus, she did not meet the requirement of a fresh or prompt complaint. *Id.* at 1190-91. Whether a complaint is fresh or prompt lies with the discretion of the judge and is based on the circumstances of the case. *Id.* at 1190. On appeal, the SJC held the victim’s complaint of the sexual assault was reasonably prompt and, therefore, the testimony did not exceed the bounds of the doctrine at that time. *Id.* at 1191. However, because of this case, the SJC decided to reexamine the fresh complaint doctrine and modify it, naming it the “first complaint” doctrine. *Id.* at 1193-94. The court stated:

[W]e are, however, provided with an opportunity to reconsider the scope and continued necessity for that doctrine. We have considered the history of the doctrine, its development and application during the past years, as well as the continued relevance of the theories that have supported its vitality. We conclude that the doctrine requires modification. The “first complaint” rule we announce today, broader in some respects than the prior rule and narrower in others, reflects a contemporary understanding of information that will permit jurors to make a fair assessment of a sexual assault complainant’s credibility.

*Id.* at 1193-94. The SJC relied on research showing sexual assault victims often do not report the assault promptly for a variety of reasons. *Id.* at 1194. The court explained:

[T]hat research suggests that, in part because the harm suffered by sexual assault victims often consists of the psychological harm caused by the defendants’ violation of a victim’s body, such victims respond in a variety of ways to the trauma of the crime, and often do not promptly report or disclose the crime for a range of reasons, including shame, fear, or concern they will not be believed.

*Id.* Under the new first complaint doctrine, a delay in disclosing a sexual assault will not bar the testimony of a first complaint witness. *Id.* at 1197. The promptness or freshness of a complaint will no longer determine the credibility of a victim. See *id.*; 14A H.J. ALPERIN & ROLAND F. CHASE, MASS. PRAC.: SUMMARY OF BASIC LAW § 7:203 (5th ed. 2016) (discussing first complaint doctrine). The SJC reconsidered the scope of the fresh complaint doctrine and decided it needed to be revised, and renamed it to better fit its purpose. See ALPERIN & CHASE *supra* § 7:203. The first complaint doctrine allows the witness of a complainant’s first complaint of sexual assault to testify in court. See ALPERIN & CHASE *supra* § 7:203.

fresh the complaint was.<sup>32</sup> The first complaint witness may testify about the details and circumstances surrounding the complaint.<sup>33</sup> The purpose of the newly-revised doctrine is to refute the stereotype that silence is evidence of a lack of credibility on the victim, and to provide the jury with a complete account of what happened.<sup>34</sup>

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<sup>32</sup> See *King*, 834 N.E.2d at 1197 (discussing only one first complaint witness permitted to testify). In *King*, the SJC stated:

[W]e will no longer permit in evidence testimony from multiple complaint witnesses, limiting the testimony to that of one witness—the first person told of the assault. The testimony of multiple complaint witnesses likely serves no additional corroborative purpose, and may unfairly enhance a complainant’s credibility as well as prejudice the defendant by repeating for the jury the often horrific details of an alleged crime.

*King*, 834 N.E.2d at 1197; ALPERIN & CHASE, *supra* note 31 and accompanying text. Later, the *King* court also described how to identify the first complaint witness:

[W]here feasible, that single complaint witness will be the first or initial complaint witness, i.e., the person who was first told of the assault, and may testify to the details of the alleged victim’s first complaint of sexual assault and the circumstances surrounding that first complaint as part of the prosecution’s case-in-chief.

*King*, 834 N.E.2d at 1198; see also 19 WILLIAM G. YOUNG ET AL., MASS. PRAC.: EVIDENCE § 413 (updated Feb. 2016) (identifying first complaint witness). Ordinarily, there will be only one first complaint witness, and that witness is not barred from testifying if the complainant’s report of the sexual assault is abbreviated in its description. YOUNG ET AL., *supra*. If the complainant tells someone that he or she is upset, unhappy, or scared, it is not a first complaint under the rule. YOUNG ET AL., *supra* Law enforcement officials, medical professionals, and social workers may be a first-complaint witness if they are the first person informed of the sexual assault. YOUNG ET AL., *supra*.

<sup>33</sup> See ALPERIN & CHASE, *supra* note 31 (explaining permitted testimony by first complaint witness). “Under the revised doctrine, the recipient of a complainant’s first complaint of an alleged sexual assault may testify about the fact of the first complaint and the circumstances surrounding the making of the first complaint, as well as the details of the complaint . . .” *Id.* In addition, the first complaint doctrine recognizes that “[s]ome inconsistency or discrepancy between the complainant’s testimony and that of the first complaint witness with regard to the description of the alleged sex acts is expected and permitted, i.e., the first complaint testimony need not replicate precisely the complainant’s own testimony.” *Id.*; YOUNG ET AL., *supra* note 32 (discussing scope of first complaint witness testimony). The first complaint witness may testify about the observations of the complainant during the complaint. *Id.*

<sup>34</sup> See ALPERIN & CHASE, *supra* note 31 (describing purpose of first complaint doctrine). “The limited purpose of first complaint testimony is to assist the jury in determining whether to credit the complainant’s testimony about the alleged sexual assault; it may not be used to prove the truth of the allegations.” *Id.* See also *King*, 834 N.E.2d at 1200 (stating purpose of first complaint doctrine). The SJC stated that:

[T]he goal of this new first complaint doctrine is to give the jury as complete a picture as possible of how the accusation of sexual assault first arose. That complete picture will allow them to make a fairer and more accurate assessment of the validity of that accusation, based on specific information about the people involved rather than on outdated stereotypes and generalities.



Six years later, the SJC in 2011 reviewed and modified the first complaint doctrine, as it was concerned about the scope of admissibility.<sup>35</sup> The modification would allow for a judge to have discretion in deciding which witness may testify as the first complaint witness, or if additional testimony may be heard if the victim told more than one person about the sexual assault.<sup>36</sup> The first complaint doctrine applies whenever sexual assault and consent are at issue in a case.<sup>37</sup>

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*King*, 834 N.E. 2d at 1200.

<sup>35</sup> See *Commonwealth v. Aviles*, 958 N.E.2d 37, 41 (Mass. 2011) (modifying first complaint doctrine since its enunciation in *King*). In *Aviles*, the defendant was convicted of rape of a child and indecent assault and battery on a child under the age of fourteen. *Id.* On appeal, the defendant challenged the admissibility of testimony about a second complaint made by the victim. *Id.* at 44. The victim first told her mother that the defendant had “touched her,” but did not give any further information. *Id.* at 42. Two years later, the victim told her grandmother about the rape that it had occurred in the bathroom with the defendant. *Id.* The grandmother informed the victim’s mother about the incident and the mother reported it to the police. *Id.* The judge only allowed testimony from the victim and the victim’s mother. *Id.* at 43. During this testimony, the victim and her mother could mention that the grandmother had been told about rape, but the details of that conversation were not permitted. *Id.* On appeal, the SJC upheld the conviction. *Id.* at 51. The SJC held that “the Commonwealth was not entitled to present evidence, either from [the victim] or her mother, pertaining to [victim’s] disclosure to her grandmother.” *Id.* at 45. The court explained that a complainant may not testify to the fact that she complained to others, aside from the first complainant witness, about the sexual assault. *Id.* at 46. However, the court concluded that admission of this testimony did not prejudice the defendant and it was independently admissible on other grounds in the judge’s discretion. *Id.* at 45-47. The court took this opportunity to reexamine the scope of the first complaint doctrine since it was enunciated in *Commonwealth v. King*. *Id.* at 48. The court was concerned “with the fact that sexual assault victims, particularly children, often do not promptly report or disclose such crimes for a variety of reasons, including fear, shame, psychological trauma, or concern that they will not be believed.” *Id.* Because of this concern, the court decided to modify the first complaint doctrine by allowing a judge more discretion in determining what first complaint evidence is admissible, even if it may include testimony about a complaint to more than one person. *Id.* at 49.

<sup>36</sup> See *id.* at 48-49 (explaining judge has greater discretion under modification). In analyzing the first complaint doctrine, the SJC stated:

[I]t has become apparent that trial judges need greater flexibility to deal with the myriad factual scenarios that arise in the context of purported first complaint evidence. Rules, because of their inherent inflexibility, tend to break down when it becomes necessary to address factual circumstances not yet contemplated by the established rubric. Rather than considering the first complaint doctrine as an evidentiary “rule,” it makes greater sense to view the doctrine as a body of governing principles to guide a trial judge on the admissibility of first complaint evidence.

*Id.* at 49. The court recognizes that there may be situations in which more than one first complaint witness needs to testify. *Id.* Additionally, as part of the modification to the doctrine, an appellate court shall review the admission of first complaint evidence for an abuse of discretion. *Id.* The modification of the first complaint doctrine serves to protect the interests of both victims and defendants in a sexual assault trial. *Id.*

<sup>37</sup> See *id.* at 49 (stating first complaint doctrine applies to allegations of sexual assault). “[W]e have considered the first complaint doctrine to be an ‘evidentiary rule’ that is designed ‘to give support to a complainant’s testimony of a sexual assault in cases where the credibility of the

In *Commonwealth v. Mayotte*, the SJC applied the updated first complaint doctrine to a case where both the victim and the defendant were asserting first complaint evidence of sexual assault in the same trial.<sup>38</sup> The court, in a case of first impression, was required to decide if the doctrine was only meant to apply to the alleged victim in a criminal case.<sup>39</sup> The court began its analysis by looking at the purpose behind the first complaint doctrine.<sup>40</sup> It found that the underlying purpose of the first complaint doctrine was to dispel the mistaken belief that a credible sexual assault victim promptly discloses the sexual assault to someone.<sup>41</sup> The court further recognized that the first complaint doctrine was intended to protect victims of sexual assault by providing the jury with an accurate account of what happened.<sup>42</sup>

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accusation is a contested issue at trial.” *Id.* at 48-49 (quoting *Commonwealth v. Arana*, 901 N.E.2d 99, 110 (Mass. 2009)).

<sup>38</sup> *Commonwealth v. Mayotte*, 56 N.E.3d 756, 761-62 (Mass. 2016) (describing use of first complaint evidence in same trial). D.M., the victim, had first complaint evidence from the testimony of his girlfriend. *Id.* at 761. Mayotte, the defendant, filed a pretrial motion to present first complaint evidence from a friend that she was raped by the victim. *Id.*

<sup>39</sup> *See id.* at 760 (questioning whether first complaint doctrine applies to defendant in rape prosecution). The SJC granted certiorari because the application of the first complaint doctrine to a defendant in a sexual assault prosecution has never been addressed. *Id.*

<sup>40</sup> *See id.* at 762 (explaining origin of first complaint doctrine). The court noted that before modification, the doctrine was based on an English common law assumption that sexual assault victims are credible only when they report the assault promptly. *Id.* In response to empirical studies regarding an individual’s disclosure of sexual assault, the SJC modified the doctrine to allow testimony of a victim’s first complaint without the fear that it was not prompt or timely as the old doctrine had required. *Id.* at 763. The doctrine applies “whenever the credibility of a sexual assault allegation is at issue.” *Id.* at 762.

<sup>41</sup> *See id.* at 763 (determining doctrine only requires evidence of initial complaint regardless of when it is made). In reviewing the current rationale behind the doctrine as it was last modified, the SJC in *Mayotte* turned to its decision in *King*. *Id.*; *Commonwealth v. King*, 834 N.E.2d 1175, 1197 (Mass. 2005) (announcing modified first complaint doctrine). “Under the doctrine as we modify it today, ostensible ‘delay’ in disclosing a sexual assault is not a reason for excluding evidence of the initial complaint; the timing of a complaint is simply one factor the jury may consider in weighing the complainant’s testimony.” *King*, 834 N.E.2d at 1197.

<sup>42</sup> *See King*, 834 N.E.2d at 1197-98 (stating doctrine exists to aid jurors in determining credibility of sexual assault victim). The SJC stated:

[A]lso under our new rule, a first complaint witness may testify to the circumstances surrounding the initial complaint. By “circumstances,” we mean that the witness may testify to his or her observations of the complainant during the complaint; the events or conversations that culminated in the complaint; the timing of the complaint; and other relevant conditions that might help a jury assess the veracity of the complainant’s allegations or assess the specific defense theories as to why the complainant is making a false allegation.

*Id.* at 1199-200.

Although the scope of the doctrine was never defined, it was meant, to be used by the complaining victim of sexual assault.<sup>43</sup> Nevertheless, previous case law shows that the use of the first complaint doctrine was not denied to a defendant in a sexual assault case.<sup>44</sup> Therefore, the court concluded that the doctrine is a neutral rule of evidence.<sup>45</sup> The court held that both a victim and a defendant may offer first complaint evidence when there is an allegation of sexual assault within the same trial.<sup>46</sup> The court reasoned that by declaring the first complaint doctrine as a neutral rule of evidence, the purpose of the doctrine is achieved because it furthers the interests of protecting anyone who complains of sexual assault.<sup>47</sup> In *Commonwealth v. Mayotte*, the defendant

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<sup>43</sup> See *Mayotte*, 56 N.E.3d at 763 (discussing scope of first complaint doctrine as it stands).

<sup>44</sup> See *id.* (noting established precedent does not preclude defendants from offering first complaint evidence). The court stated:

[A]s demonstrated by our cases, the first complaint rule owes its genesis to the confluence of two factors: (1) that the central issue is a sexual assault rather than some other nonsexual crime; and (2) the need to provide to the jury “as complete a picture as possible of how the accusation of sexual assault first arose.”

*Id.* (quoting *Commonwealth v. King*, 834 N.E.2d 1175, 1200 (Mass. 2005)). The court stated the doctrine is simply meant to be used when allegations of sexual assault are at issue. *Id.*

<sup>45</sup> See *id.* at 760. The court held “one-sided evidentiary rules are inherently unfair.” *Id.* at 764. “The defendant is no less entitled than the Commonwealth to the benefit of a principle intended to mitigate the inherent obstacles to establishing the credibility of a sexual assault allegation.” *Id.* at 763-64. The court ultimately determined the first complaint doctrine must be a neutral rule of evidence applicable to both victims and defendants. *Id.* at 764. In reaching this decision, the court looked to the concerns expressed in *Commonwealth v. Morales* regarding whether a defendant was permitted to introduce evidence of prior acts of violence by the victim. *Id.*; *Commonwealth v. Morales*, 982 N.E.2d 1105, 1107 (Mass. 2013) (holding defendant was permitted to introduce evidence against victim). In *Commonwealth v. Morales*, the court said that allowing both a victim and a defendant to introduce evidence serves the purpose “of providing the jury with ‘as complete [of] a picture . . . as possible before deciding on the defendant’s guilt.’” *Morales*, 982 N.E.2d at 1111 (quoting *Commonwealth v. Adjutant*, 824 N.E.2d 1, 9 (Mass. 2005)).

<sup>46</sup> See *id.* at 763 (“[T]he identity of the party making the allegation of sexual assault does not dictate the application of the doctrine.”). The application of the doctrine to a defendant in a sexual assault case does not undermine the purpose of the doctrine. *Id.* The SJC was “persuaded that the first complaint doctrine must be neutral, and that it may apply whenever the credibility of a sexual assault allegation is a live issue in the case.” *Id.* at 764. Furthermore, it found “the first complaint doctrine applies for the benefit of any party who makes an allegation of sexual assault that is contested by the alleged perpetrator.” *Id.* at 762.

<sup>47</sup> See *id.* at 764 (finding concerns of jury confusion will not militate against defendant to offer first complaint evidence); Brief for the Commonwealth at 22-24, *Commonwealth v. Mayotte*, 56 N.E.3d 756 (Mass. 2016) (No. SJC-11894) (arguing first complaint doctrine only applies to victim); Brief for the Defendant on Appeal from the Worcester Div. of the Superior Court Dep’t at 19-30, *Commonwealth v. Mayotte*, 56 N.E.3d 756 (Mass. 2016) (No. SJC-11894) (arguing first complaint doctrine applies to defendant in sexual assault case); Defendant’s Reply Brief at 1-15, *Commonwealth v. Mayotte*, 56 N.E.3d 756 (Mass. 2016) (No. SJC-11894).

was not prejudiced by the denial of her first complaint evidence.<sup>48</sup> However, the court held that it erred when it determined the first complaint doctrine did not apply to the defendant.<sup>49</sup>

The issue in *Commonwealth v. Mayotte* is not whether the first complaint doctrine applies to a complainant of sexual assault, but whether it can be used by a defendant in a sexual assault case to rebut the allegations.<sup>50</sup> The court first had to decide how the first complaint doctrine was meant to be used as an evidentiary rule.<sup>51</sup> After looking to the history behind the first complaint doctrine, the court found that the rule should apply to any person, whether a complainant or defendant, who alleges that they were the victim of a sexual assault.<sup>52</sup> As a result of this holding, the court ultimately set new precedent.<sup>53</sup>

In fact, the holding of the court reinterpreted existing law.<sup>54</sup> In the case, the Commonwealth argued in this case, that the first complaint doctrine only applies to a complainant of sexual assault, as it had never been applied to a defendant before.<sup>55</sup> As part of this argument, the Commonwealth claimed that allowing such evidence by the defendant would be inadmissible hearsay.<sup>56</sup> However, this was not a strong argument for the Commonwealth because, as the court put it, the “evidence is not offered for its truth.”<sup>57</sup> Furthermore, allowing first complaint evidence by a defendant presents complications for future litigation.<sup>58</sup> For example, if first complaint evidence is allowed to be heard by a defendant in a sexual assault prosecution, it would not appear to be a defense to the charge, but rather, a trial within a trial.<sup>59</sup>

When a defendant presents first complaint evidence of their own and asserts that they were in fact sexually assaulted by the complainant, the

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<sup>48</sup> See *Mayotte*, 56 N.E.3d at 761-62 (holding defendant was not prejudiced by denial of first complaint evidence).

<sup>49</sup> See *id.* (holding first complaint doctrine applies to defendants). The first complaint doctrine was not limited to only the complainant of sexual assault, but also applied to the defendant’s complaint of sexual assault as a defense to the charges. *Id.*

<sup>50</sup> See *id.* at 763 (stating issue of whether first complaint doctrine may be used by defendant).

<sup>51</sup> See *id.* 762-64 (discussing rationale behind first complaint doctrine).

<sup>52</sup> See *id.* at 760 (holding first complaint doctrine is neutral rule of evidence).

<sup>53</sup> See *Mayotte*, 56 N.E.3d at 762 (finding for first time that first complaint doctrine may be used by defendants).

<sup>54</sup> See *id.* at 763-64 (holding scope of first complaint doctrine applies to defendants).

<sup>55</sup> See *id.* at 762-64 (arguing against use of first complaint doctrine by defendants).

<sup>56</sup> See *id.* at 762 (stating Commonwealth’s argument that such testimony from defendant would be hearsay).

<sup>57</sup> See *id.* (asserting first complaint evidence is not hearsay).

<sup>58</sup> See *Mayotte*, 56 N.E.3d at 764 (commenting new application may cause jury confusion).

<sup>59</sup> See *id.* (“The Commonwealth argues that application of the first complaint doctrine to defendants will cause jury confusion as well as create a trial within a trial.”).

jury will have to determine the credibility of both allegations, which undermines the Commonwealth's case.<sup>60</sup> A jury is present to decide whether the defendant sexually assaulted the complainant; and now, under the court's holding, a jury will have to assess two allegations of sexual assault in the very same trial.<sup>61</sup> As argued by the Commonwealth in *Mayotte*, this could easily lead to "jury confusion as well as create a trial within a trial."<sup>62</sup> In this particular case, the defendant's first complaint evidence was inadmissible solely because it was insufficient; as a result, the court did not address what discretion a trial judge would be allowed in determining the scope of the defendant's testimony to protect against jury confusion.<sup>63</sup> Finally, because the evidence was inadmissible, it left open the question of when such evidence would be sufficient to be considered a proper disclosure of sexual assault.<sup>64</sup>

In *Commonwealth v. Mayotte*, the Massachusetts SJC held for the first time that the first complaint doctrine is a neutral rule of evidence which may be used by any party in a sexual assault trial. This new application of the first complaint doctrine will allow a defendant in a sexual assault trial to assert that they were the victim rather than the perpetrator. By declaring that the first complaint doctrine is a neutral rule of evidence, the court furthered the doctrine's purpose of protecting sexual assault victims. Now, all victims have an equal opportunity to be heard by a jury and more importantly, to be heard in court, without regard to when or to whom they disclosed the sexual assault to.

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<sup>60</sup> See *id.* at 763-64 (stressing "the importance of an *informed* determination of credibility").

<sup>61</sup> See *id.* (describing jury's tasks in first complaint cases).

<sup>62</sup> See *id.* at 764 (explaining trial judge must use discretion to prevent such confusion).

<sup>63</sup> See *Mayotte*, 56 N.E.3d at 764 (concluding defendant's proffer was vague and inadmissible on other grounds). All the court stated was that "[t]he matter properly may be relegated to the trial judge who, in the exercise of his or her discretion, is adequately equipped by the existing rules of evidence to prevent any such confusion."

<sup>64</sup> See *id.* at 764-65 (determining "the omission of [defendant's] first complaint evidence 'did not influence the jury or had but very slight effect'"). The statement that the defendant made to her friend Ed Kassor, would have had little to no value as first complaint evidence. *Id.* at 764. Also, the statement did not explicitly assert a claim of rape. *Id.* at 765. It offered very few details. *Id.* at 764. The statement the defendant tried to offer was the same statement she told police: "she 'tried to tell [her] friend Ed,'" which does not meet the disclosure requirement. *Id.* Statements of unhappiness and other related feelings are not statements of sexual assault. *Id.* (citing *Commonwealth v. Murungu*, 879 N.E.2d 99, 103 (Mass. 2008)).