

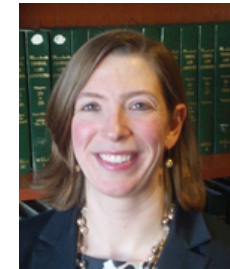
## Case Focus

### ***Commonwealth v. Aviles* and the Continuing Evolution of the First Complaint Doctrine**

By Anne Pogue Donohue

Recently, in *Commonwealth v. Aviles*, 461 Mass. 60 (2011), the Massachusetts Supreme Judicial Court announced a significant reformulation of the “first complaint” doctrine in sexual assault cases. The SJC created the “first complaint” doctrine seven years ago, when it abandoned the “fresh complaint” doctrine. See *Commonwealth v. King*, 445 Mass. 217 (2005), *cert. denied*, 546 U.S. 1216 (2006). Prosecutors could no longer have multiple witnesses testify about what a sexual assault victim told them about the assault; instead, a prosecutor would be limited, generally, to introducing the testimony of only the first person to whom the victim disclosed the assault. In other words, the prosecution could introduce only the victim’s “first complaint.” The purpose of the “first complaint” doctrine, as had been the purpose of the “fresh complaint” rule it replaced, was to support a victim’s credibility by countering the widely-held assumption that a victim who is not fabricating her allegations would have made a contemporaneous complaint of the assault. Another purpose of the “first complaint” doctrine was to avoid unfairly enhancing a victim’s credibility by allowing multiple repetitions of the victim’s complaint as had been permitted under the “fresh complaint” doctrine.

As the SJC confronted difficulties in applying the first complaint doctrine, two concurring opinions appeared. They suggested that at least some of the justices were thinking about changing the doctrine yet again, or possibly even abandoning it altogether. See *Commonwealth v. McCoy*, 456 Mass. 838,



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854-856 (2010) (Marshall, C.J., Botsford and Gants, JJ., concurring); *Commonwealth v. Dargon*, 457 Mass. 387, 405-406 (2010) (Marshall, C.J., Botsford and Gants, JJ., concurring). These ruminations culminated in *Aviles*, where the SJC affirmed the vitality of the first complaint doctrine but significantly modified the standard of review on appeal.

In *Aviles*, the eight-year-old victim told her mother in 2002 that the defendant (who was her mother's boyfriend) had "touched" her, but she did not provide any further detail. The victim and her mother moved out of the house. Three years later, after seeing the defendant's photograph on TV, the victim told her grandmother the details of the sexual assault three years earlier. The grandmother then told the victim's mother, who in turn contacted the police. The defense theory was that the victim fabricated the allegations against the defendant, with whom the victim and her mother were living, because she wanted to go live with her grandmother.

The defendant moved *in limine* to restrict the complaint testimony to the victim's initial report to her mother that the defendant had "touched" her, thereby excluding any evidence relating to the victim's more detailed disclosure three years later to her grandmother. The trial judge agreed that the substance of the victim's statement to the grandmother was inadmissible under the first complaint doctrine. However, she allowed the witnesses to testify that the victim had made a disclosure to the grandmother after seeing the defendant's photograph on television, and that the disclosure led the mother to the police.

Given that the victim's 2002 statement to her mother was the "first complaint," the SJC accordingly affirmed the trial court's ruling that the substance of the victim's disclosure to her grandmother was inadmissible under the first complaint doctrine. The Court also held that it was error to admit the fact of the later disclosure to the grandmother because the victim's "testimony regarding the fact of her disclosure was essentially the same as permitting her grandmother to testify, thereby lending improper credence to [the victim's] account." *Id.* at 69. Nevertheless, the Court ruled that the error was harmless because the testimony was independently admissible "to rebut the defendant's

suggestion that [the victim] had fabricated her accusations in order to return to her grandmother's house." *Id.* at 70-71.

*Aviles* re-affirmed the vitality of and established new parameters for the first complaint doctrine. The SJC also explicitly changed the standard of appellate review. The Court held that the first complaint doctrine would no longer be treated as an evidentiary rule. Rather, to give trial judges "greater flexibility," the doctrine should be viewed as "a body of governing principles to guide a trial judge on the admissibility of first complaint evidence." *Id.* at 72-73. As a result, the trial judge's decision to admit such evidence will be reviewed on appeal for abuse of discretion. If an abuse of discretion is found, presumably the appellate court will order reversal only if the error is prejudicial (in the case of preserved error) or if it created a substantial risk of a miscarriage of justice (in the case of unpreserved error).

What does this mean for us as practitioners going forward? Perhaps the biggest question mark left open in *Aviles* is whether the new rule will apply retroactively to cases tried before the decision issued. *Aviles* did not address this question, so for now, we must await further guidance from the appellate courts on this issue. With regard to trials, the effects of *Aviles* will be more subtle and will vary from case to case. The SJC unequivocally stated that *Aviles* does not signal "a relaxation or erosion of our first complaint jurisprudence." *Id.* at 73. Accordingly, practitioners should expect trial judges to continue applying the first complaint doctrine but with greater latitude, as provided by *Aviles*, in assessing what complaint evidence may properly be admitted based on the circumstances of each case. A big difference will no doubt come on appeal as a result of the new standard of appellate review. To reverse for abuse of discretion, the appellate courts must find that "no conscientious judge, acting intelligently, could honestly have taken the view expressed by [the trial judge]." *Commonwealth v. Ira I.*, 439 Mass. 805, 809 (2003) (internal quotes and citations omitted). Because it is more difficult for defendants to meet this higher standard, it is likely that fewer cases will be reversed on the basis of admission of evidence in violation of the first complaint doctrine. ■