

Chapter 7

The Admissibility of Complaint Evidence: Focusing on Time is a Waste of Time

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She must go at once and while the deed is newly done, with the hue and cry, to the neighbouring townships and there show the injury done to her to men of good repute, the blood and her clothing stained with blood, and her torn garments.¹

Bracton on the Laws and Customs of England, 13th Century

Bracton's 13th century text instructed that for a prosecution to occur a rape victim must cry rape when the rape was newly done. Consistent with this focus on prompt complaint, legislation enacted in the same century prohibited a woman from seeking legal redress if 40 days had passed since the rape.² By 1896, the leading common law case on complaint evidence used the 'old text books'³ in support of the principle that for complaint evidence to be admissible it had to be made 'as speedily after the acts complained of as could be reasonably be expected'.⁴ This focus on time was applied in Australia so that only complaint evidence that was made at the 'earliest possible opportunity' was admissible.⁵ The recent complaint rule was one of the special evidentiary rules⁶ that had developed in the context of the law's mistrust of sexual assault complainants and its use of rules to reinforce sexual stereotypes and rape myths.⁷ Delayed complaint

1 GE Woodbine (ed), *De Legibus et consuetudinibus Angliae Libri quinque* (*Bracton on the Laws and Customs of England*) (written sometime between 1250 and 1260, edited from 1915 to 1942, translated with revisions and notes by SE Thorne) (Harvard University Press, 1968), 414-415.

2 M Hale, *History of the Pleas of the Crown* (London, 1736), Vol I, 627.

3 *R v Lillyman* (1896) 2 QB 167, 170 citing Hawkins' Pleas of the Crown and Blackstone's Commentaries which refer to Bracton.

4 *R v Lillyman* (1896) 2 QB 167, 171.

5 *Kilby v The Queen* (1973) 129 CLR 460.

6 Other rules are the rule requiring corroboration (*Longman v The Queen* (1989) 168 CLR 79) and the rule allowing the complainant's past sexual history to be admissible as relevant to a fact in issue (*R v Bashir* [1969] 3 All ER 692) or as an exception to the credibility rule (*Gregory v The Queen* (1983) 151 CLR 566).

7 Feminist scholarship has examined that the operation of evidential rules in rape trials reveals an underlying distrust of complainants, bias and stereotyping. The rules are influenced by Lord Hale's view that rape is an easy allegation to make but one that is difficult to defend: G Geis, 'Lord Hale, Witches and Rape' (1978) 5 *British Journal of Law and Society* 26; G Geis, 'Revisiting Lord Hale, Misogyny, Witchcraft and Rape' (1986) 10 *Criminal Law Journal* 319. See also L Ellison and M Childs (ed), *Feminist Perspectives on Evidence* (Cavendish, 2000); K Mack, 'Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process' (1993) 4 *Criminal Law Forum* 327; K Kinports, 'Evidence Engendered' (1991) 2 *University of Illinois Law Review*

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