

ACT 89

S.B. NO. 829

A Bill for an Act Relating to the Hawaii Rules of Evidence.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The purpose of this Act is to conform the Hawaii rules of evidence in civil cases to the current rape shield laws with respect to sex offense cases and the relevance of the victim's past behavior (rule 412). The legislature finds that this Act is necessary to provide further protection for women and children who are the victims of sexual offenses or sexual harassment.

SECTION 2. Section 626-1, Hawaii Revised Statutes, is amended by amending rule 412 to read as follows:

**“Rule 412 Sexual [assault] offense and sexual harassment cases; relevance of victim’s past behavior.** (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual [assault,] offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of [such] the sexual [assault] offense is not admissible to prove the character of the victim [in order] to show action in conformity therewith.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual [assault,] offense, evidence of an alleged victim’s past sexual behavior other than reputation or opinion evidence is not admissible to prove the character of the victim [in order] to show action in conformity therewith, unless [such] the evidence is:

- (1) Admitted in accordance with subsection (c)(1) and (2) and is constitutionally required to be admitted; or
  - (2) Admitted in accordance with subsection (c) and is evidence of:
    - (A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
    - (B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual assault is alleged.
- (c)(1) If the person accused of committing a sexual [assault] offense intends to offer under subsection (b) evidence of specific instances of the alleged victim’s past sexual behavior, the accused shall make a written motion to offer [such] the evidence not later than fifteen days before the date on which the trial in which [such] the evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which [such] the evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.
- (2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (b), the court shall order a hearing in chambers to determine if [such] the evidence is admissible. At [such] the hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subsection (b) of rule 104, if the relevancy of the evidence [which] that the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for [such] this purpose, shall accept evidence on the issue of whether [such] the condition of fact is fulfilled and shall determine [such] the issue.
  - (3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence [which] that the accused seeks to offer is relevant and that the probative value of [such] the evidence outweighs the danger of unfair prejudice, [such] the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence [which] that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) In any civil action alleging conduct which constitutes a sexual offense or sexual harassment, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.

(e) Subsection (d) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator.

(f) In a civil action alleging conduct which constitutes a sexual offense or sexual harassment, if the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff.

(g) Nothing in subsections (d), (e) or (f) shall be construed to make inadmissible evidence offered to attack the credibility of the plaintiff.

[(d)] (h) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a sexual [assault] offense or sexual harassment is alleged."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

(Approved June 23, 1999.)