

A VIEW FROM THE CARIBBEAN:
Vulnerable Witnesses in sexual offence cases

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Morley J

Mr. Justice Morley KC has practiced as a barrister from London since 1990, originally in all aspects of criminal law (mostly murder, rape, drugs, and financial crimes), prosecuting and defending. From 2005, he became a well-known figure on the international circuit, practicing in genocide, war crimes, crimes against humanity, and international terrorism, where following a period of pro bono work from October 2004, assisting the defense of Slobodan Milosevic at the International Criminal Tribunal for the former Yugoslavia in The Hague, he was then in Arusha, Tanzania from March 2005, before Sir Dennis Byron PC (formerly CJ of the Eastern Caribbean Supreme Court, and later president of the Caribbean Court of Justice), assisting the UN to prosecute the 1994 Rwandan genocide of the Tutsi by the Hutu at the International Criminal Tribunal for Rwanda, where he was Trial Counsel in four cases concerning six leading defendants. He took Silk in April 2009, and was then appointed senior trial counsel at the UN Special Tribunal for Lebanon in The Hague as the tribunal opened, where he led marshalling the evidence and writing the indictment, confirmed in June 2011, against the alleged assassins from Hezbollah in 2005 of former Lebanese Prime Minister, Rafik Hariri. In January 2013, until his appointment to the Bench in 2016, Mr Justice Morley returned to domestic practice in London, mostly prosecuting and defending in murder.

He has worked and taught in more than 40 jurisdictions and assisted visiting practitioners and judges from a further 20, on advocacy skills, criminal law procedures, financial crime and international criminal law. He is also an established advocacy teacher, both nationally and internationally, in particular on vulnerable witnesses, and his book *The Devil's Advocate* is currently a worldwide bestselling book on advocacy skills.

In November 2016, he was appointed to High Court Bench of the Eastern Caribbean Supreme Court to the criminal division on Antigua & Barbuda until March 2021, and to all matters on Montserrat until November 2023. In 2021 to the end of 2025, he was further appointed to St Kitts where he is the Senior Judge. From January 2026, he will be the resident judge on Nevis. Morley J has been Co-Chair of the ECSC Sentencing Guidelines Advisory Committee during 2017-2-25, was from 2019-2021 the dedicated judge to develop the regional 'model court' for sexual offences, and from January 2024 was appointed a Vice-Chair of the ECSC Judicial Education Institute. In his spare time, he enjoys sailing around the Caribbean islands.

In this article, concerning vulnerable witnesses in sexual offence cases, I will explore differences I have observed in practice between courts in the Caribbean and in England & Wales, by which I mean mostly London and the South-Eastern Circuit where I practiced in criminal law for many years.

Witness vulnerability is a growing area through the Commonwealth. Professor Penny Cooper has led much of the way and produced the *Advocacy Gateway*, online¹, in which there are multiple 'toolkits' for questioning persons who have different disabilities. In the UK, for some years, I have been a teacher of young lawyers in advocacy skills in how to deal with vulnerable persons in the court room. Also, annually at Keble College, Oxford, at the long-standing August week-long South Eastern Circuit international advanced advocacy course, drawing advocates and trainers from around the Commonwealth world, where for some years I taught, there is a specific portion of the course dedicated to how to question a person in a mock trial with learning challenges and autism. Further, there is now a requirement that advocates prosecuting in certain cases are certified to have done vulnerable witness training in order to be briefed to appear in court.

From online overview, the primary legislation in the UK then introducing new approaches to vulnerable witnesses was the **Youth Justice and Criminal Evidence Act 1999 (YJCEA)**, which introduced "special measures" to assist vulnerable or intimidated individuals when giving evidence in criminal proceedings. Under **s16 YJCEA**, a witness is considered vulnerable if they are under 18 years of age, or if the quality of their evidence is likely to be diminished because they:

- suffer from a mental disorder or have a significant impairment of intelligence or social functioning;
- have a physical disability or are suffering from a physical disorder;
- or are likely to suffer fear or distress in connection with giving evidence due to the circumstances of the case or their personal situation;
- while persons reporting cases of domestic abuse, sexual offences, stalking, and human trafficking are also automatically assumed to be vulnerable for the purpose of receiving support and special measures.

Courts can direct the use of various such 'special measures' to ensure vulnerable witnesses can give their best evidence. These can be used individually or in combination, as follows:

- Screens: to conceal the witness from the accused;

¹ See <https://www.theadvocatesgateway.org/toolkits>

- Live-link: to allow the witness to give evidence from another room in the court building or a separate location entirely;
- Pre-recorded cross-examination, under **s28 YJCEA**: this allows the cross-examination and re-examination to be recorded before the main trial, so the witness generally does not have to attend the live trial;
- Intermediaries and communication aids: a registered intermediary can assist the witness in communicating questions and answers effectively;
- Evidence in private: the court can direct that the public be excluded from the courtroom when the witness is testifying (though press representatives may still be present);
- Removal of wigs and gowns: judges and barristers may remove their traditional court attire to create a less intimidating environment; and
- Supporters: A friend, relative, or support worker may accompany the witness while they are giving evidence.

Since 2016, I have been a judge in criminal trials on Antigua, Montserrat and St Kitts concerning sexual offences, and in 2017 I was a primary editor of the first guidelines on a regional model court, since updated in 2022², convening a panel in Trinidad, with President Saunders and Mde Justice Rajnauth-Lee of the Caribbean Court of Justice, the equivalent of the UK Supreme Court. The model court was launched in 2019 on Antigua where I was its first dedicated judge until 2021, when I was then appointed to St Kitts. The reason for its creation was there was a strong perception that how sexual offence cases were handled in court was much out of step with other Commonwealth countries.

Problems were: witnesses were not orientated to the court in advance, with no idea what to expect of a trial process; defence advocates routinely were hectoring, belittling, judgmental, and castigating, often using insinuation and inuendo to suggest testimony unworthy of belief, hinting at sexual irresponsibility and multiple partners to imply consent, even when arguing in parallel no sexual event had ever occurred; there were no special measures being deployed to assist in making a witness comfortable; and there was no witness support offered by the police or prosecution to keep victims informed of progress of their case through the

² See <https://ccj.org/18997-2/>

court system, which in the Caribbean would often take several years, leading to despair, and later disinterest in pursuing the allegation.

On Antigua in 2019, tv equipment was introduced with generous sponsorship by the Jurist Project from Canada into the High Court so there could be video connection to testimony, saving the witness from being in court in front of the defendant, with a room allocated for livelink in the court building and in the offices of the ministry for gender affairs. However, at first this was such a change to proceedings it was not much used, so that the use of a large of screen in the courtroom was more often deployed, as it was perceived by prosecutors culturally it would be better for a jury to see a complainant in the witness box, while there was also unreliable internet connection, with insufficient bandwidth to allow a steady signal and consistent presentation. Gradually this has changed. However, prior, there had been often appearance without any measure, which occurred even with witnesses under 16, at one point one as young as 7 presented before this judge in open court. Mde Justice Ann Marie Smith is currently the dedicated judge for the model court on Antigua and under her leadership the use of video-link post-covid has happily much increased, while there is now a dedicated witness support officer and routine court orientation so the mystery of being a witness has been much reduced.

On Montserrat, each island state being different, and it being more immediately in step with UK legal developments, there has for a greater time been advanced use of special measures, with video-link the norm, not a screen, and the government quickly invested in improved bandwidth upon my request. For a time, the tiny island was being put forward regionally as the poster for improvement. It also convened a first use within the Eastern Caribbean Supreme Court of an intermediary, who assisted the court by screening questions and then asking them, of a girl aged 11 who was mute on video-link, being **R v Kayoy Jarrett 2021**³, which was widely discussed after by jurists regionally.

On St Kitts, the legislation has been the least developed. With recruitment in 2023 of a new DPP from Antigua, Crown Counsel Adlai Smith, there is legislation expected to set up the various special measures listed above, and with encouragement of the court, there has been more and more use of video-link, permissible in rudimentary form under the local **Evidence Act**. There has recently been a case with a victim on link, and in camera, reporting abuse when 17 by a taxidriver taking her home from the school prom, and who is so traumatized that for a whole court-day she has been in tears, clearly in need of counselling, which is helpfully

³ See <https://eccourts.org/judgment/regina-v-kayoy-jarrett-2>

now a growing service on-island, but which shows how difficult it can be to give evidence of a sexual nature, when living in a small community, and how important it is to make the experience of giving evidence as comfortable as possible, seeking not to re-traumatize through the act of giving testimony. Challenges persist, as the link is on a weak bandwidth, with the signal dropping, and the court does not have a dedicated online zoom connection, except through the clerk's laptop, though the image goes to a court tv, so that the court microphone is the laptop, requiring counsel to stand by it and not more widely distributed around the room. Regular request to the ministry to improve the situation has not yet been successful.

Regionally, sentencing has difficulty. The maxima are often different for sexual offences on the islands, for example, for unlawful sexual intercourse, it being life if the victim is aged 13, 14 or 15 on St Kitts, or 10 years on Antigua, leading to wide variations in sentencing outcome between these two near neighbours. In parallel, there are occasions where there are pay-offs to drop cases, and on Antigua and on St Kitts there have been proceedings against lawyers for assisting, also contemplated where a pastor has made approaches, and even against the mother of a victim for seeking money.

It is clear sexual offending creates complexities here not much seen in the UK, raising especial vulnerability, there even being a former Premier from Montserrat currently imprisoned for child sexual exploitation.

The biggest challenge may be for the community to be less judgmental toward complainants in these cases. There is a perception among the talkative that sexual offence allegations are routinely made as lies and easily uttered in a courtroom to willing listeners keen to convict, much gossiped about on social media, so that defence counsel often give themselves the role of warrior defending against outrageous injustice, railing against weak cases, uncorroborated, being launched against men defenceless against scheming women, who are given to misunderstanding and being vexatious, when the truth is far from this, which is that it is always hard to bring an sexual offence allegation, anywhere, but especially in the Caribbean, without being held up to ridicule and unfairly as an outright liar. Such witnesses are especially vulnerable, by just making complaint. Progress is being made. There is much yet to achieve. Slowly the snail reaches the oak. In 10 years, I have seen and contributed to making complaint less bewildering. The courts through the region will now stop counsel from being hostile, insinuation about sexual history is not allowed, while caution and sensitivity have become more frequent and expected.

Such complaints by their nature create vulnerability, and particularly here. But with education in schools about improved relations between the sexes, a growing divide is clear between the older and the younger, where the younger have become braver and more determined to pursue justice and to expect fairness at trial.

Every week brings hard work to the Bench, there being many murders too, and the weekends will see this judge on the water, under sail, to keep some balance.



Judge Morley, far right, competing in the Antigua Classics Regatta in April 2025