SAFE IN THE KNOWLEDGE

Following the Court of Appeal decisions in *GMC v Sir Roy Meadow* [2007] QB 462 and *Paul Stretford v The Football Association Limited* [2007] 2 Lloyds Rep 31 there remains undesirable uncertainty concerning the extent of immunity for non-expert witnesses.

A witness enjoys immunity from civil suit in respect of evidence he gives in judicial and quasi-judicial proceedings. On the other hand, a witness has no immunity from criminal proceedings such as for perjury. What has not been authoritatively determined is whether a non-expert witness has immunity from disciplinary proceedings arising from his evidence although the case for such is compelling.

In *Meadow* a complaint was raised about the expert’s evidence in the *R v Sally Clark* (2007), namely that he had stepped outside of his area of expertise and given potentially misleading evidence. The GMC found him guilty of serious professional misconduct and removed him from the register. The High Court found that the expert had immunity but the Court of Appeal allowed the GMC’s appeal finding that an expert had no immunity from disciplinary proceedings.

Subsequently, in *Stretford*, The FA argued that the *Meadow* decision had effectively sealed the fate of non-expert witnesses as well. Mr Stretford faced disciplinary charges to the effect that he knowingly gave false evidence in a criminal trial wherein he was the complainant. The Crown had already investigated his conduct and decided there was no basis for criminal charges against Mr Stretford. The FA insisted it was entitled to investigate one of its own licensed agents and bring charges alleging he had knowingly given false evidence in Court. Mr Stretford argued he had immunity from disciplinary proceedings as well as contesting the charges on the merits.

The FA relied, in part, upon paragraph 112 of the *Meadow* judgment: “the fact that a witness – expert or otherwise – may be deterred from making himself available to give evidence in civil, criminal or other judicial proceedings for fear of disciplinary proceedings by his professional body arising out of serious professional misconduct by him in the witness box is no basis for extending the immunity to such proceedings.” (per Auld LJ).

The case of *Meadow* was however solely concerned with the immunity of an expert witness acting as such. The reasoning was almost exclusively concerned with the balance between ensuring an expert was free to give his evidence and on the other hand ensuring that an expert discharged his duties to the Court as well as protecting the public from future harm. It is difficult to see how *Meadow* is authority in respect of a non-expert witness and the sentence in Auld LJ’s judgment anything but obiter. There are, of course, important differences between an expert and non-expert witness:

(1) the non-expert witness is usually involved in only one case by force of circumstances. As a witness he undertakes one obligation only: to tell the truth to the best of his ability. There are well established ways of dealing with a witness who knowingly gives false evidence;
the expert witness has agreed to provide his professional services, usually, in more than one case. His services primarily consist of giving opinion evidence. Disciplinary proceedings might be the only way of protecting the public from an expert who although guilty of gross negligence does not commit perjury.

Whatever the arguments for and against immunity applying to disciplinary proceedings, there should be no uncertainty as to its existence and extent. Unfortunately the Court in Stretford, whilst finding it “tempting” to rule on the issue, did not determine the issue but rather stayed the case for arbitration. The arbitrator then stayed the arbitration pending completion of The FA’s disciplinary commission and appeal board hearings. The expensive process of exhausting the disciplinary process before returning back to the arbitration and then Court could not be completed.

This is particularly unfortunate when it is remembered why witness immunity exists: “The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person must know at the time he speaks whether or not the immunity will attach” per Lord Hoffman, Taylor v Director of the SFO [1999] 2 AC 177, 214.

The administration of justice depends upon a witness being willing to “speak freely without fear of being sued” and this requires that he know at the time he speaks whether or not he has immunity. A non-expert witness may be concerned about speaking freely if, at the time he speaks, he is uncertain about whether he could be the subject of disciplinary proceedings as a result of his evidence:

(1) the witness may decide not to give evidence because he does not wish to run the risk of disciplinary proceedings however ill conceived those would be. Even if confident any charges would be defeated he may not wish to risk adverse publicity or the expense that may flow from defending spurious charges. He may also be concerned that disciplinary charges need only be proved on the balance of probabilities and without certain safeguards available in criminal proceedings eg the power to summons witnesses and disclosure of documents;

(2) the witness may, at the very least, wish to take independent advice about whether he should be involved in the Court proceedings at all, what the issues are, the relevance of documents to those issues and Court procedure: such advice is infrequent in civil proceedings and very rare in criminal cases;

(3) the witness should know that, unless he is a party in civil proceedings, he is not represented by an advocate inside Court. In criminal proceedings the prosecutor does not undertake to represent or advise the complainant or any other witness – a point often overlooked.

If a witness’s knowledge of his immunity is necessary for confidence which in turn is important for the administration of justice, uncertainty as to its extent undermines both confidence and the administration of justice.

This article was co-written by David Casement QC, Serle Court and Julian Diaz-Rainey, Halliwells LLP and first appeared in The Lawyer on 7 December 2009.