



1982

Casenotes: Torts — Defamation — Judicial Immunity — Absolute Immunity Afforded Potential Witnesses for Statements Published in Unfiled Documents Prepared for Possible Use in a Pending Judicial Proceeding. *Adams v. Peck*, 288 Md. 1, 415 A.2d 292 (1980)

Harold Douglas Norton
University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>

 Part of the [Law Commons](#)

Recommended Citation

Norton, Harold Douglas (1982) "Casenotes: Torts — Defamation — Judicial Immunity — Absolute Immunity Afforded Potential Witnesses for Statements Published in Unfiled Documents Prepared for Possible Use in a Pending Judicial Proceeding. *Adams v. Peck*, 288 Md. 1, 415 A.2d 292 (1980)," *University of Baltimore Law Review*: Vol. 11: Iss. 2, Article 7.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol11/iss2/7>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

TORTS — DEFAMATION — JUDICIAL IMMUNITY — ABSOLUTE IMMUNITY AFFORDED POTENTIAL WITNESSES FOR STATEMENTS PUBLISHED IN UNFILED DOCUMENTS PREPARED FOR POSSIBLE USE IN A PENDING JUDICIAL PROCEEDING. *Adams v. Peck*, 288 Md. 1, 415 A.2d 292 (1980).

I. INTRODUCTION

In *Adams v. Peck*,¹ the Court of Appeals of Maryland held that a party litigant may not maintain a defamation action against a potential adverse witness based on that witness's unfiled written report to the opponent's attorney during the course of litigation. Previously, absolute immunity had been afforded only to witnesses' statements made on the stand and to documents filed in court.² By virtue of *Adams*, the court of appeals has now extended absolute immunity to statements published in all documents prepared for possible use in a pending judicial proceeding, regardless of their subsequent use.³

This casenote explores the common law development of witness immunity from defamation suit.⁴ The facts and holding of the *Adams* decision are analyzed in light of Maryland case law as well as similar decisions in other jurisdictions. Finally, a probable future extension of witness immunity in Maryland defamation law is prescribed.

II. BACKGROUND

A. Generally

When opposing suit for defamation, defendants may assert, among other defenses, either absolute or qualified immunity.⁵ Where absolute immunity exists, evidence of a witness's unreasonable or malicious publication will not defeat it.⁶ The defense of qualified immunity, however, may be overcome by proof of malice.⁷ One of the most widely

1. 288 Md. 1, 415 A.2d 292 (1980).

2. *Adams v. Peck*, 43 Md. App. 168, 175-76, 403 A.2d 840, 844-45 (1979), *aff'd*, 288 Md. 1, 4, 415 A.2d 292, 293-94 (1980).

3. 288 Md. 1, 4, 415 A.2d 292, 294 (1980).

4. For a thorough discussion of witness immunity in defamation law, see L. ELDREDGE, *THE LAW OF DEFAMATION* § 73, at 369-71 (1978) [hereinafter cited as ELDREDGE]; 28 HALSBURY'S *LAW OF ENGLAND* ¶ 98 (4th ed. 1979 & Supp. 1981); F. HARPER & F. JAMES, *THE LAW OF TORTS* § 5.22 (1974) [hereinafter cited as HARPER & JAMES]; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 114 (4th ed. 1971) [hereinafter cited as PROSSER]; *RESTATEMENT (SECOND) OF TORTS* § 588 (1977) [hereinafter cited as *RESTATEMENT*]; Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909) [hereinafter cited as Veeder]; *Developments in the Law — Defamation*, 69 HARV. L. REV. 875, 917-24 (1956) [hereinafter cited as *Developments in the Law*].

5. *O'Barr v. Feist*, 292 Ala. 440, 445, 296 So. 2d 152, 156 (1974); Veeder, *supra* note 4, at 464-65.

6. *O'Barr v. Feist*, 292 Ala. 440, 445-46, 296 So. 2d 152, 156 (1974); *Devlin v. Greiner*, 147 N.J. Super. 446, 455, 371 A.2d 380, 384-85 (1977) (dictum); Veeder, *supra* note 4, at 464-65; *Developments in the Law*, *supra* note 4, at 917-19.

7. *Washer v. Bank of America Nat'l Trust & Sav. Ass'n*, 21 Cal. 2d 822, 831-33, 136 P.2d 297, 303 (1943); *Spoehr v. Mittelstadt*, 34 Wis. 2d 653, 659, 150 N.W.2d 502,

accepted judicial immunities, the defense of witness immunity creates an absolute privilege that protects witnesses from suit for defamation published in relation to judicial proceedings.⁸ So long as the matter is published in the context of a pending suit, no further inquiry will be made concerning the merits of a defamation claim — the witness is immune from suit as a matter of law.⁹

Courts have found it essential to grant immunity to witnesses to enable them to participate candidly and without fear of vexatious litigation.¹⁰ Time and money spent litigating issues of fact concerning malice are considered detrimental to the promotion of free disclosure.¹¹ The ability of witnesses to speak freely and to exercise their duty without incurring the risk of suit is viewed as a necessary corollary to the rule that testimony can be encouraged through compulsory process.¹²

Witnesses have consistently been accorded absolute immunity in criminal proceedings¹³ and civil actions in equity¹⁴ and at law.¹⁵ Additionally, a majority of jurisdictions grant absolute immunity to witnesses who testify in other proceedings in which justice is

504 (1967); Veeder, *supra* note 4, at 464-65. Proof of malice is a matter resolved by the trier of fact. HARPER & JAMES, *supra* note 4, § 5.22 at 420-21; Veeder, *supra* note 4, at 470. For discussion and application of the distinction between absolute and qualified privilege, see O'Barr v. Feist, 292 Ala. 440, 444-45, 296 So. 2d 152, 156 (1974).

8. *E.g.*, O'Barr v. Feist, 292 Ala. 440, 296 So. 2d 152 (1974); Zirn v. Cullom, 187 Misc. 241, 63 N.Y.S.2d 439 (1946); Beezly v. Hansen, 4 Utah 64, 286 P.2d 1057 (1955); Darnell v. Davis, 190 Va. 701, 58 S.E.2d 68 (1950).
9. *Developments in the Law*, *supra* note 4, at 923; *see, e.g.*, McLaughlin v. Copeland, 455 F. Supp. 749 (D. Del. 1978)(motion under rule 12(b)(6) of the Federal Rules of Civil Procedure granted), *aff'd mem.*, 595 F.2d 1213 (3d Cir. 1979); Anderson v. Matz, 67 Ill. App. 3d 175, 384 N.E.2d 759 (1978)(dismissal of complaint upheld). For a discussion concerning pleading and raising the defense of witness immunity, *see* Annot., 51 A.L.R.2d 552 (1957).
10. Rainer's Dairies v. Raritan Valley Farms, 19 N.J. 552, 558, 117 A.2d 889, 891 (1955) (dictum); Watson v. M'Ewan, [1905] A.C. 480, 487 (Scot. 1904); EL-DREDGE, *supra* note 4, § 73 at 340; Veeder, *supra* note 4, at 471; *Developments in the Law*, *supra* note 4, at 917. Because the law recognizes that "[l]awsuits are not peace conferences but battles," witnesses are given absolute rather than qualified immunity. Bussewitz v. Wisconsin Teachers Ass'n, 188 Wis. 121, 127, 205 N.W. 808, 811 (1925).
11. Veeder, *supra* note 4, at 470; *Developments in the Law*, *supra* note 4, at 918; 45 BROOKLYN L. REV. 131, 135-41 (1976).
12. HARPER & JAMES, *supra* note 4, § 5.22 at 696.
13. *See, e.g.*, Imig v. Ferrar, 70 Cal. App. 3d 48, 55-57, 138 Cal. Rptr. 540, 542-44 (1977); Flynn v. Boglarsky, 164 Mich. 513, 516, 129 N.W. 674, 676 (1911); *cf.*, *e.g.*, Talpin-Rice-Clerkin Co. v. Hower, 124 Ohio St. 123, 125, 177 N.E. 203, 203-04 (1931) (statement made in grand jury proceedings).
14. *E.g.*, Matthis v. Kennedy, 243 Minn. 219, 220-21, 229, 67 N.W.2d 413, 415, 419-20 (1954); Massey v. Jones, 182 Va. 200, 201, 28 S.E.2d 623, 623-24 (1944).
15. *E.g.*, Johnson v. Dover, 201 Ark. 175, 143 S.W.2d 1112 (1940).

administered¹⁶ or legal relations decided.¹⁷ The general rule in favor of free disclosure has also been extended to formal written matters filed in court.¹⁸ Moreover, absolute immunity now applies to matters published during the formal pretrial discovery process¹⁹ and to communications made informally during litigation.²⁰

B. *The English and American Rules*

English and American courts have developed two seemingly different rules concerning witness immunity that, in practice, often yield similar results.²¹ The maxim that "[w]ords spoken in a court of justice

-
16. ELDREDGE, *supra* note 4, § 73(d) at 345-49. The following cases involve administrative proceedings: *Wilson v. Hirst*, 67 Ariz. 197, 198, 201-02, 193 P.2d 461, 462, 464 (1948); *Rainer's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 555-57, 559-62, 117 A.2d 889, 890-91, 892-94 (1955); *Moore v. West Lawn Memorial Park, Inc.*, 266 Or. 244, 248-51, 512 P.2d 1344, 1346-47 (1973); *Hartman v. Buerger*, 71 Wis. 2d 393, 397-400, 238 N.W.2d 505, 508-09 (1976).

The minority view, which affords only qualified immunity in administrative proceedings, *e.g.*, *Milton v. Solonsky*, 19 Ariz. App. 65, 67-68, 504 P.2d 1288, 1290-91 (1973), is said to disregard the balance struck by the majority in favor of full disclosure. ELDREDGE, *supra* note 4, § 73(d) at 347. *Compare* *Milton v. Solonsky*, 19 Ariz. App. 65, 67-68, 504 P.2d 1288, 1290-91 (1973) (qualified immunity) *with* *Rainer's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 559-62, 117 A.2d 889, 894-95 (1955) (absolute immunity). In deciding whether to extend witness immunity to administrative proceedings, courts have examined the type of proceeding and whether it contains procedures similar to those in judicial proceedings. *Developments in the Law, supra* note 4, at 920-22.

17. Witnesses in grand jury proceedings are absolutely immune from suit for defamation published in the course of investigation. *E.g.*, *Martirano v. Frost*, 25 N.Y.2d 505, 507-08, 255 N.E.2d 693, 694, 307 N.Y.S.2d 425, 427 (1969); *Taplin-Rice-Clerkin Co. v. Hower*, 124 Ohio St. 123, 125, 177 N.E. 203, 203-04 (1931); *Bergman v. Hupy*, 64 Wis. 2d 747, 752, 221 N.W.2d 898, 901-02 (1974) (overruling *Schultz v. Strauss*, 127 Wis. 325, 106 N.W. 1066 (1906)).
18. *E.g.*, *Hart v. Baxter*, 47 Mich. 198, 200, 10 N.W. 198, 199 (1881) (pleading). *See generally* Annot., 32 A.L.R.2d 423 (1953) (statements in briefs); Annot., 23 A.L.R.3d 1172 (1969) (discovery matters).
19. *E.g.*, *Thornton v. Rhoden*, 245 Cal. App. 2d 80, 85-86, 53 Cal. Rptr. 706, 716 (1966) (pleading and deposition); *Beezley v. Hansen*, 4 Utah 2d 64, 65, 286 P.2d 1057, 1058 (1955) (deposition); *Spoehr v. Mittelstadt*, 34 Wis. 2d 653, 662-63, 150 N.W.2d 502, 505-06 (1967) (pretrial conference). *See generally* Annot., 23 A.L.R.3d 1172 (1969).
20. *E.g.*, *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656, 659 (1972) (statements by witness to attorney concerning pending litigation); *Anderson v. Matz*, 67 Ill. App. 3d 175, 179, 384 N.E.2d 759, 761 (1978) (report by retained doctor to insurance company); *Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n*, 68 N.J. Super. 85, 90-92, 172 A.2d 22, 24-26 (1961) (report from retained consultant to attorney); *Zatzkin v. Cornell*, 53 Misc. 2d 829, 829-30, 279 N.Y.S.2d 934, 935 (1967) (letter from non-party to bankruptcy officials); *Williams v. Congdon*, 43 N.C. App. 53, 55, 257 S.E.2d 677, 678 (1979) (unsolicited letter to officer in quasi-judicial proceeding); *Beezley v. Hansen*, 4 Utah 2d 64, 66-67, 286 P.2d 1057, 1058 (1955) (unfiled deposition of witness). *Contra*, *Lapetina v. Sontangelo*, 124 A.D. 519, 108 N.Y.S. 975 (1908) (unfiled letter from client to attorney). *See generally* ELDREDGE, *supra* note 4, § 73 at 365-70; RESTATEMENT, *supra* note 4, § 588, Comment d.
21. PROSSER, *supra* note 4, § 114 at 778-79, 782. *Compare* *O'Barr v. Feist*, 292 Ala.

are not actionable"²² finds expression in the English rule that matters published by a witness in the course of a judicial proceeding are absolutely privileged.²³ Thus, English courts extend absolute immunity to matters arising out of a proceeding, regardless of relevance, so long as they refer to the inquiry for which the testimony was sought.²⁴ This standard, that a defamatory matter need only have a reasonable relationship to the issues at hand,²⁵ protects all participants in litigation²⁶ and even extends to matters published outside the formal litigation process.²⁷

Alarmed by the idea that the English rule allowed extraneous defamation to be published without remedy,²⁸ American courts have held that voluntary statements "plainly irrelevant and impertinent" and for which the witness "could not reasonably have supposed to be relevant" are not protected.²⁹ All doubts, however, are resolved in favor of relevance.³⁰ Consequently, despite any semantic differences between the two rules, application of the American standard will normally yield the same result reached under the English rule.³¹

440, 446, 296 So. 2d 152, 157 (1974) with *Hargreaves v. Bretherton*, [1958] 1 Q.B. 45, 54.

22. *Weston v. Dobniet*, 79 Eng. Rep. 369, 369 (K.B. 1617).

23. 28 HALSBURY'S LAWS OF ENGLAND ¶ 98 (4th ed. 1979 & Supp. 1981). "Neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally, for words spoken in office." *King v. Skinner*, 98 Eng. Rep. 529, 530 (K.B. 1772) (Mansfield, L.J.); see cases cited note 26 *infra*.

24. *Dawkins v. Rokeby*, L.R. 8 Q.B. 255, 263-64 (1873); *Henderson v. Broomhead*, 28 L.J. Ex. 360, 360-63 (1859); see *Munster v. Lamb*, 11 Q.B.D. 588, 601 (C.A. 1883) (dictum).

25. *Gompas v. White*, 6 T.L.R. 20, 21 (J.P. 1889); *Revis v. Smith*, 139 Eng. Rep. 1314, 1315-16 (C.P. 1856); PROSSER, *supra* note 4, § 144 at 778. This relaxed standard of logical relationship was used, for example, in *Seaman v. Netherclift*, 1 C.P.D. 540 (1876), in which a handwriting expert published an unsolicited opinion that a will was a "rank forgery." No action for defamation was allowed despite the absence of an open question concerning the validity of the will. *Id.* at 543, 546-47. In *Munster v. Lamb*, 11 Q.B.D. 588 (C.A. 1883), the Court of Appeal, Queen's Bench Division, stated, in dictum:

[W]ith regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the Court - whether what they say is relevant or irrelevant, whether what they say is malicious or not - are exempt from liability to any action in respect of what they state, whether the statement has been made in words, . . . or whether it has been made upon affidavit.

Id. at 601 (Brett, M.R.).

26. *E.g.*, *Seaman v. Netherclift*, 1 C.P.D. 540 (1876) (witness); *Scott v. Stansfield*, L.R. 3 Ex. 220 (1868) (judge); *Munster v. Lamb*, 11 Q.B.D. 588 (C.A. 1883) (counsel); *Henderson v. Broomhead*, 28 L.J. Ex. 360 (1859) (party).

27. *Beresford v. White*, 30 T.L.R. 591, 591-92 (C.A. 1914).

28. PROSSER, *supra* note 4, § 114 at 778.

29. *O'Barr v. Feist*, 292 Ala. 440, 446, 296 So. 2d 152, 157 (1974).

30. *Id.*; *Bussewitz v. Wisconsin Teachers Ass'n*, 188 Wis. 121, 125, 205 N.W. 808, 810 (1925).

31. ELDRIDGE, *supra* note 4, § 73(g) at 354-55; HARPER & JAMES, *supra* note 4, § 5.22 at 799. Compare *Matthis v. Kennedy*, 243 Minn. 219, 67 N.W.2d 413 (1954) and *Martirano v. Frost*, 25 N.Y.2d 505, 255 N.E.2d 693, 307 N.Y.S.2d 425 (1969) with

Although American courts have extended absolute immunity to attorneys and parties for matters published prior to the initiation of litigation,³² witness immunity has been afforded only to statements made by potential witnesses after suit has been filed.³³ Accordingly, in *Middlesex Concrete Products & Excavating Corp. v. Carteret Industrial Association*,³⁴ the Superior Court of New Jersey granted absolute immunity to a consultant's unfiled report concerning pending litigation, which was made pursuant to the request of a party litigant. In so doing, the court stated that "the investigation, report, consultation, and advice . . . pertinent and relevant to the litigation as preliminary steps in the defense of the case and as part of the preparation for the actual trial . . . are part of a judicial proceeding and within the privilege."³⁵ On the other hand, in *Devlin v. Greiner*,³⁶ the New Jersey court refused to extend witness immunity to a private detective's report that was found to have no direct connection with a later filed divorce proceeding.³⁷ The *Devlin* court held that it could not be shown from the record that litigation had even been planned, much less instituted, when the investigation was made.³⁸ Similarly, in *Twelker v. Shannon & Wilson, Inc.*,³⁹ the Supreme Court of Washington held that a report prepared by an engineering firm, prior to the commencement of a judicial proceeding, was not protected by absolute privilege. In so holding, the court distinguished the *Middlesex* decision on the grounds that, unlike the facts in *Middlesex*, no suit had been filed and no compelling public policy warranted extension of witness immunity to pre-litigation

Seaman v. Netherclift, 1 C.P.D. 540 (1876) and Munster v. Lamb, 11 Q.B.D. 588 (C.A. 1883)(dictum).

32. *Izzi v. Rellas*, 104 Cal. App. 3d 254, 261-63, 163 Cal. Rptr. 689, 691-93 (1980) (attorney's letter to opposing counsel); *Lerette v. Dean Witter Organization, Inc.*, 60 Cal. App. 3d 573, 576-78, 131 Cal. Rptr. 592, 594-95 (1976)(attorney's letter to potential litigant); *Sriberg v. Raymond*, 370 Mass. 105, 108-09, 345 N.E.2d 882, 883-84 (1976) (attorney's letter to potential litigant); *Cuddy v. Kueker*, 7 Mass. App. 896, 896, 387 N.E.2d 213, 214 (1979) (party litigant's statement to attorney). *Contra*, *Brown v. Collins*, 402 F.2d 209, 212-14 (D.C. Cir. 1968) (party's telephone conversation non-privileged); *Kenney v. Cleary*, 47 A.D.2d 531, 532, 363 N.Y.S.2d 606, 609 (1975) (communication between attorney and client given qualified immunity); *Wright v. Lawson*, 530 P.2d 823, 825-26 (Utah 1975) (attorney's letter to adverse party given qualified immunity).
33. *Devlin v. Greiner*, 147 N.J. Super. 446, 371 A.2d 380 (1977); *Twelker v. Shannon & Wilson, Inc.*, 88 Wash. 2d 473, 564 P.2d 1131 (1977); ELDREDGE, *supra* note 4, § 73(q) & (r) at 369-70. Reports made to officials prior to commencement of criminal proceedings are, however, afforded absolute immunity. *Holmes v. Eddy*, 341 F.2d 477, 480-81 (4th Cir.), *cert. denied*, 382 U.S. 892 (1965); *Martirano v. Frost*, 25 N.Y.2d 505, 255 N.E.2d 693, 307 N.Y.S.2d 425 (1969); *Taplin-Rice-Clerkin Co. v. Hower*, 124 Ohio St. 123, 177 N.E. 203 (1931).
34. 68 N.J. Super. 85, 172 A.2d 22 (1961).
35. *Id.* at 92, 172 A.2d at 25.
36. 147 N.J. Super. 446, 371 A.2d 380 (1977).
37. *Id.* at 457-60, 371 A.2d at 388.
38. *Id.* at 458-60, 371 A.2d at 386-87.
39. 88 Wash. 2d 473, 564 P.2d 1131 (1977).

communications.⁴⁰

The result in the *Twelker* case has been criticized as being too narrow in its application of witness immunity.⁴¹ Further, both *Twelker* and *Devlin* are in direct conflict with the *Restatement* position, which extends immunity to matters published prior to filing of suit, provided that the proceeding was contemplated in good faith when the matter was published.⁴² This broad approach to witness immunity is similar to that taken in the English decisions.⁴³

As in this country, the English rule of witness immunity protects persons from defamation suits for matters published as part of the formal trial procedure. Protection is also given to informal matters published in preparation for trial. For example, in the leading case of *Watson v. M'Ewan*,⁴⁴ an expert witness was sued for informal out of court statements.⁴⁵ The expert's opinion had been solicited by opposing counsel in a pending separation proceeding.⁴⁶ In holding the witness immune from suit, the court stated that broadening the scope of the fact-finding process through the extension of absolute immunity was necessary for the administration of justice.⁴⁷

The *Watson* court was careful to point out the factors that make the immunity applicable: first, the matter must be published to "those engaged in the legal business"; second, the matter may not be published to persons outside the litigation; and third, the matter must be

40. *Id.* at 478, 564 P.2d at 1134. The court in *Twelker* stated:

The extraordinary breadth of absolute privilege seems to us to require some compelling public policy justification for its existence. Where a law suit has been filed, the court in *Middlesex* found the need for uninhibited preliminary conferences and reports sufficient to establish such a justification. Respondent has cited no case where absolute privilege has been extended to statements made prior to the initiation of a lawsuit nor has he presented public policy arguments of such a compelling nature as to justify such an extension. In the absence of such arguments we decline to apply the absolute privilege accorded statements in the course of or preliminary to judicial proceedings to the circumstances of this case.

Id.

41. ELDREDGE, *supra* note 4, § 73 at 370.

42. RESTATEMENT, *supra* note 4, § 588. Section 588 provides: "A witness is absolutely privileged to publish defamatory matter concerning another in communication preliminary to a proposed judicial proceeding in which he is testifying, if it has some relation to the proceeding."

43. See *Lincoln v. Daniel*, [1961] 1 Q.B. 237, 247; *Burr v. Smith*, [1909] 2 K.B. 306, 316. Compare RESTATEMENT, *supra* note 4, § 588 with *Beresford v. White*, 30 T.L.R. 591, 592 (C.A. 1914).

44. [1905] A.C. 480 (Scot. 1904).

45. The expert witness, a doctor, initially examined Jessie M'Ewan in 1901. In 1903, she was again examined by the doctor at the request of her husband. *Id.* at 481-82. The doctor's informal report to Mr. M'Ewan and his counselor inferred that Mrs. M'Ewan used drugs illegally and that she desired "criminally to procure an abortion." *Id.* at 484.

46. The separation action was filed prior to the disclosures that became the subject of the *Watson* defamation suit. *Id.* at 481-82.

47. *Id.* at 487.

published to help further the collection of evidence in pending litigation.⁴⁸ Because the communications in *Watson* were not published through formal trial procedures, the case represented a major development in the English witness immunity rule.⁴⁹

The *Watson* rule was extended one step further in *Beresford v. White*,⁵⁰ which held a potential witness immune from suit for matters published to the solicitors of a person who, though not a party litigant in a pending proceeding, had "plainly intimated" that he intended to institute legal proceedings.⁵¹ This contrasts with the American decisions, which extend absolute immunity only to cases in which suit has been filed.

C. Maryland Adopts the English Rule

Maryland law has long assisted participants in judicial proceedings in defending against litigation for defamatory statements.⁵² Three cases, decided the same day, serve as "[t]he fountainhead of Maryland law"⁵³ on participant immunity. In *Maulsby v. Reifsnider*,⁵⁴ the court of appeals held that an attorney is immune from defamation suit based on trial statements that were relevant to the proceeding.⁵⁵ In *Hunckel v. Voneiff*,⁵⁶ the court expressly adopted the English rule and held that a witness was absolutely immune from suit for allegedly defamatory in-court statements.⁵⁷ Finally, in *Bartlett v. Christhilf*,⁵⁸ the court found that matters published by a party litigant in any phase of a lawsuit are

48. *Id.* at 488. When these three requirements are satisfied, absolute immunity applies without regard to whether the witness testifies voluntarily. *Id.* at 488-89. Nor does it matter that the publisher is ultimately called as a witness against the party who first sought his opinion. *Id.* Thus, if the matter in question would be privileged as sworn testimony, it is also privileged as an informal preliminary examination of a potential witness in a pending judicial proceeding. *Id.* at 489.

49. ELDRIDGE, *supra* note 4, § 73(o) at 368.

50. 30 T.L.R. 591 (C.A. 1914).

51. *Id.* at 592.

52. *E.g.*, *Maulsby v. Reifsnider*, 69 Md. 143, 14 A. 505 (1888) (attorney); *Hunckel v. Voneiff*, 69 Md. 179, 14 A. 500 (1888) (witness); *Bartlett v. Christhilf*, 69 Md. 219, 14 A. 518 (1888) (party litigant).

53. *Adams v. Peck*, 43 Md. App. 168, 171, 403 A.2d 840, 842 (1979), *aff'd*, 288 Md. 1, 415 A.2d 292 (1980). For an excellent discussion of witness immunity in defamation law, see *id.* at 171-77, 403 A.2d at 842-45.

54. 69 Md. 143, 14 A. 505 (1888).

55. *Id.* at 164, 14 A. at 510.

56. 69 Md. 179, 14 A. 500 (1888).

57. *Id.* at 193, 14 A. at 504. The *Hunckel* court stated:

[W]e are not controlled by any decision of our own courts, and are at liberty to settle the law for this State according to our best judgment. After a most careful consideration of the subject, we are convinced that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited, and we accordingly adopt the law on this subject as they have laid it down.

Id.

58. 69 Md. 219, 14 A. 518 (1888).

absolutely privileged even if made falsely or maliciously.⁵⁹

The majority of Maryland cases decided since the *Maulsby-Hunckel-Bartlett* trilogy have involved the immunity of counsel⁶⁰ and party litigants.⁶¹ The case of *Kennedy v. Cannon*,⁶² which involved immunity of counsel, serves as a basis for modern Maryland law concerning absolute immunity from defamation litigation.⁶³ In its discussion of judicial immunity, the court of appeals stated, in dictum, that absolute immunity should extend to a witness's defamatory statements "made in the course of trial or contained in pleadings, affidavits, depositions, and other documents directly related to the case."⁶⁴ Up to this point, the *Kennedy* dictum provided the only statement of Maryland law concerning witness immunity for matters published outside of an actual trial.

III. THE FACTS OF *ADAMS v. PECK*

Doctor Peter R. Adams and his wife separated and filed for divorce in July of 1976.⁶⁵ In August of that year, the couple executed a separation agreement that gave Mrs. Adams custody of their two chil-

59. *Id.* at 226, 14 A. at 520.

60. *Korb v. Kowalewicz*, 285 Md. 699, 703-04 n.1, 402 A.2d 897, 899 n.1 (1979); see *Di Blasio v. Kolodner*, 233 Md. 512, 521-23, 197 A.2d 245, 249-51 (1964); *Kennedy v. Cannon*, 229 Md. 92, 95-99, 182 A.2d 54, 56-58 (1962); *Kerpelman v. Bricker*, 23 Md. App. 628, 629-30, 329 A.2d 423, 425 (1974).

61. *E.g.*, *Herring v. Citizens Bank & Trust Co.*, 21 Md. App. 517, 525-28, 321 A.2d 182, 187-88, *cert. denied*, 272 Md. 742 (1974); *Wesko v. G.E.M., Inc.*, 19 Md. App. 161, 169-70, 310 A.2d 191, 195-96 (1973), *aff'd*, 272 Md. 192, 321 A.2d 529 (1974); see *Korb v. Kowalewicz*, 285 Md. 699, 703-04 n.1, 402 A.2d 897, 899 n.1 (1979).

In *Wesko*, the court of special appeals held that all "steps" taken by a party litigant and its agents to procure judgment on a wage attachment were absolutely privileged. 19 Md. App. at 169-70, 310 A.2d at 195-96. It is not clear from the opinion that those steps included communications by the defendant only in the course of formal pretrial procedures.

In cases involving witness immunity at trial, the courts have followed the absolute rule of *Hunckel*. *E.g.*, *Korb v. Kowalewicz*, 285 Md. 699, 703-04, 402 A.2d 897, 898-99 (1979); *Schaub v. O'Ferrall*, 116 Md. 131, 137-39, 81 A. 789, 792 (1911). Where witnesses have spoken outside of formal trial procedures, however, a qualified rather than absolute immunity has been applied. For example, in *Orrison v. Vance*, 262 Md. 285, 277 A.2d 573 (1971), a voluntary complaint made to a state's attorney and several other county officials was given a qualified rather than absolute privilege. *Id.* at 292-94, 277 A.2d at 576-77. Similarly, in *Brinsfield v. Howeth*, 107 Md. 278, 68 A. 566 (1908), a qualified immunity was afforded a potential witness for his informal response to an inquiry made by a state's attorney concerning a pending criminal proceeding. *Id.* at 288-89, 68 A. at 568-69. It is clear, however, that in *Orrison*, no proceeding was pending and, in both *Orrison* and *Brinsfield*, no issue of absolute immunity was raised.

62. 229 Md. 92, 182 A.2d 54 (1962).

63. *Adams v. Peck*, 288 Md. 1, 4, 415 A.2d 292, 293-94 (1980); *Wesko v. G.E.M., Inc.*, 19 Md. App. 161, 169-70, 310 A.2d 191, 195 (1973), *aff'd*, 272 Md. 192, 321 A.2d 529 (1974).

64. 229 Md. 92, 97, 182 A.2d 54, 57 (1962)(citing *HARPER & JAMES*, *supra* note 4, § 5.22).

65. Brief for Appellee at 4, *Adams v. Peck*, 43 Md. App. 168, 403 A.2d 840 (1979).

dren, with weekly visitation rights for the father.⁶⁶ The next year, Mrs. Adams became concerned about her children's safety and health after statements from the children raised suspicions that their father had sexually molested them during visits to his home.⁶⁷

Upon recommendation by Mrs. Adams' attorney, the children were interviewed by Doctor Alan H. Peck, a psychiatrist.⁶⁸ In February 1977, Dr. Peck, believing that the incidents of molestation had occurred, made a written report containing his professional evaluation that the children's father was "an ill man and in definite need of psychiatric treatment."⁶⁹ A copy of the report was given to Mrs. Adams' attorney, who consequently filed a Petition for Modification of Visitation Rights.⁷⁰ Dr. Adams then filed suit against Dr. Peck for the allegedly defamatory statements contained in his report.⁷¹

IV. THE ADAMS HOLDING

Because Dr. Peck's unfiled report was made available to Mrs. Adams' attorney for possible use in the pending divorce litigation, the court of appeals held that Dr. Peck was absolutely immune from suit.⁷² In reaching this conclusion, the court characterized the report, in the words of *Kennedy v. Cannon*,⁷³ as being a document "directly related to the case."⁷⁴ Although several American decisions were cited to support this holding,⁷⁵ the *Adams* court followed the reasoning expressed in the English decision of *Watson v. M'Ewan*⁷⁶ in granting an absolute privilege to the report.⁷⁷

Similar to the factual situation in *Watson*, several factors were

66. *Id.*

67. *Id.*

68. *Id.*; Brief for Appellant at 10, *Adams v. Peck*, 43 Md. App. 168, 403 A.2d 840 (1979).

69. 43 Md. App. 168, 169-70, 403 A.2d 840, 841 (1979), *aff'd*, 288 Md. 1, 2, 415 A.2d 292, 293 (1980).

70. Brief for Appellee at 6, *Adams v. Peck*, 43 Md. App. 168, 403 A.2d 840 (1979).

71. *Id.* The court of special appeals held that absolute privilege protected Dr. Peck's report because it related to the pending litigation. *Adams v. Peck*, 43 Md. App. 168, 185, 403 A.2d 840, 849 (1979), *aff'd*, 288 Md. 1, 415 A.2d 292 (1980).

72. 288 Md. 1, 8-9, 415 A.2d 292, 295-96 (1980).

73. 229 Md. 92, 182 A.2d 54 (1962).

74. 288 Md. 1, 4, 415 A.2d 292, 294 (1980) (quoting *Kennedy v. Cannon*, 229 Md. 92, 97, 182 A.2d 54, 57 (1962)).

75. *Id.* at 4-5, 415 A.2d at 294 (citing *Theiss v. Scherer*, 396 F.2d 646 (6th Cir. 1968); *McLaughlin v. Copeland*, 455 F. Supp. 749 (D. Del. 1978), *aff'd mem.*, 595 F.2d 1213 (3d Cir. 1979); *Smith v. Hatch*, 271 Cal. App. 2d 39, 76 Cal. Rptr. 350 (1969); *Anderson v. Matz*, 67 Ill. App. 3d 175, 384 N.E.2d 759 (1978); *Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n*, 68 N.J. Super. 85, 172 A.2d 22 (1961); *Zirn v. Cullom*, 187 Misc. 241, 63 N.Y.S.2d 439 (1946); *Vasquez v. Courtney*, 276 Or. 1053, 557 P.2d 672 (1976); *Beezley v. Hansen*, 4 Utah 2d 64, 286 P.2d 1057 (1955)).

76. [1905] A.C. 480 (Scot. 1904).

77. 288 Md. 1, 6-7, 415 A.2d 292, 294-95 (1980) (citing *Watson v. M'Ewan*, [1905] A.C. 480 (Scot. 1904)).

present in the *Adams* litigation that warranted the extension of witness immunity to Dr. Peck. Although the issue of visitation rights had not yet been raised,⁷⁸ there was a pending divorce proceeding, and the report was solicited by the attorney for possible use in the litigation.⁷⁹ Therefore, Dr. Peck was a potential trial witness. Finally, the subject of the report had a definite relationship to the issue of visitation rights.⁸⁰ Thus, the report was solicited for "[t]he investigation, evaluation, presentation and determination of facts" known by Dr. Peck concerning the litigation.⁸¹ In reaching its conclusion, the court quoted from *Watson* that the policy behind shielding witnesses from defamation litigation "must as a necessary consequence involve that which is a step towards and is part of the administration of justice — namely, the preliminary examination of witnesses to find out what they can prove."⁸²

According to the *Adams* decision, five factors must coexist for absolute immunity to apply to a potential witness.⁸³ First, the allegedly defamatory matter must be published in a document. Second, the document must be solicited by an attorney. Third, a judicial proceeding must be pending when the matter is published. Fourth, the document must be prepared by a potential witness. Finally, the contents of the document must be directly related to the pending proceeding.

V. ANALYSIS

Ignoring prior case law emphasizing that absolute immunity should be strictly construed,⁸⁴ the *Adams* court recognized the need to clothe potential witnesses with immunity to protect them from vexatious litigation and to promote free disclosure of necessary information. This latter need was particularly apparent in the instant case; Dr. Peck's opinion and report were vitally important to the outcome of the pending divorce litigation.⁸⁵

The court also noted other policy reasons for extending absolute

78. A Petition for Modification of Visitation Rights was filed after Dr. Peck's report was forwarded to Mrs. Adams' attorney. Brief for Appellee at 6, *Adams v. Peck*, 43 Md. App. 168, 403 A.2d 840 (1979).

79. 288 Md. 1, 8, 415 A.2d 292, 295 (1980).

80. *Id.* at 8, 415 A.2d at 296.

81. *Id.* at 5, 415 A.2d at 294.

82. *Id.* at 7, 415 A.2d at 295 (quoting *Watson v. M'Ewan*, [1905] A.C. 480, 487 (Scot. 1904)) (emphasis omitted).

83. *See id.* at 4, 6, 7-8, 415 A.2d at 292, 294, 295.

84. The Court of Appeals of Maryland stated over a century ago that "[t]he doctrine of absolute privilege is so inconsistent with the rule that a remedy should exist for every wrong, that we are not disposed to extend it beyond the strict line established by a concurrence of decisions." *Maurice v. Worden*, 54 Md. 233, 253-54 (1880). *See also* *Brush-Moore Newspapers v. Pollitt*, 220 Md. 132, 137, 151 A.2d 530, 533 (1959).

85. *See* Brief for Appellee at 8-9, *Adams v. Peck*, 43 Md. App. 168, 403 A.2d 840 (1979).

immunity, regardless of whether the report was filed in court.⁸⁶ Similar to persons who testify at trial, potential witnesses frequently provide information that may be relevant to issues later raised in court. Attorneys, therefore, must be able to pursue all potential sources of information so that they may effectively prepare and determine the merits of their client's case, without subjecting those sources to private suits for defamation. Although the granting of absolute immunity may be "inconsistent with the rule that a remedy should exist for every wrong"⁸⁷ or that it may "afford an immunity to the evil-disposed and malignant slanderer,"⁸⁸ potential sources of information, vital to effective legal assistance, should be allowed to give aid without fear of subsequent defamation suits.⁸⁹

Absent from the situation in *Adams* were potential collateral sanctions, such as punishment for contempt and perjury, which are often cited as alternative remedies for false testimony.⁹⁰ According to *Watson*, the absence of collateral sanctions is to be weighed against the need for full disclosure and the unfettered candor of witnesses.⁹¹ Because the informal communications in *Adams* were viewed as integral to the issue of visitation rights, the balance was struck in favor of absolute immunity.⁹² It is this balance that must be considered when a court decides whether it should expand or contract the scope of witness immunity from suits for defamation.

Because the policy behind extending absolute immunity to potential witnesses' extrajudicial statements is to further the proper administration of justice,⁹³ certain limitations must be placed upon the context in which a matter is published for witness immunity to apply. The holding of *Adams*, that absolute privilege applies to a defamatory matter published in a document generated during the course of a pending judicial proceeding, is a narrow one. A broader application, however, may be prescribed.

86. *Adams v. Peck*, 288 Md. 1, 5-6, 415 A.2d 292, 294-95 (1980).

87. *Brush-Moore Newspapers v. Pollitt*, 220 Md. 132, 137, 151 A.2d 530, 533 (1959).

88. *Adams v. Peck*, 288 Md. 1, 6, 415 A.2d 292, 294 (1980) (quoting *Bartlett v. Christilf*, 69 Md. 219, 226-27, 14 A. 518, 520 (1888)).

89. *Id.* at 7, 415 A.2d at 295 (quoting *Watson v. M'Ewan*, [1905] A.C. 480, 487 (Scot. 1904)). "[G]iven the complexities of modern existence, few if any lawyers could, as a practical matter, represent the interest of their client without a variety of nonlegal assistance." *Adams v. Peck*, 43 Md. App. 168, 184-85, 403 A.2d 840, 849 (1979) (quoting *State v. Pratt*, 284 Md. 516, 520, 398 A.2d 421, 423 (1979)), *aff'd*, 288 Md. 1, 415 A.2d 292 (1980).

90. *See, e.g., Watson v. M'Ewan*, [1905] A.C. 480, 488 (Scot. 1904). *See generally HARPER & JAMES, supra* note 4, § 5.22 at 423-24; RESTATEMENT, *supra* note 4, § 588, Comment a.

91. *Watson v. M'Ewan*, [1905] A.C. 480, 487 (Scot. 1904). "It may be that to some extent [the rule] seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony." *Id.*

92. 288 Md. 1, 8, 415 A.2d 292, 295 (1980).

93. *Id.* at 5, 415 A.2d at 294.

The court of appeals in *Adams* recognized that the scope of absolute immunity includes "[t]he investigation, evaluation, presentation and determination of facts" that are necessary for the facilitation of the administration of justice.⁹⁴ Section 588 of the *Restatement* recommends that absolute immunity be applied to communications from a witness made prior to a proposed judicial proceeding.⁹⁵ Comment e to that section, however, adds a cautionary proviso: a proceeding must be "actually contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding."⁹⁶ The privilege, therefore, should include private conferences with attorneys, so long as the matters discussed are sufficiently related to proposed litigation.⁹⁷ Both the court of special appeals and the court of appeals quoted Comment e of section 588 with approval in *Adams*.⁹⁸ Neither court, however, found it necessary to address that issue because, even though the Petition for Modification of Visitation Rights had not yet been filed,⁹⁹ the divorce litigation was already pending.¹⁰⁰

Potential witnesses are often the only source from which attorneys can receive an objective evaluation of their client's case. Attorneys, therefore, should be able to consult potential sources of information with the assurance that what is reported will not be actionable. It would, therefore, be far more advantageous to follow the English rule, embodied in the *Restatement*, and extend immunity to communications with attorneys when litigation is contemplated in good faith. Nevertheless, immunity should obviously not be granted when the statement is "so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame."¹⁰¹

Finally, it may be argued that the absence of the collateral sanctions of contempt and perjury militate against extension of witness immunity to unrelated matters published prior to the institution of litigation.¹⁰² The response to this argument has been that defamation that is false or unrelated to legal issues will not, in most cases, find its way beyond the attorney's office.¹⁰³

94. *Id.*

95. RESTATEMENT, *supra* note 4, § 588.

96. *Id.* Comment e.

97. *Id.* Comments b & c.

98. 43 Md. App. 168, 176, 403 A.2d 840, 845 (1979), *aff'd*, 288 Md. 1, 415 A.2d 292 (1980); 288 Md. 1, 5, 415 A.2d 292, 294 (1980).

99. 288 Md. 1, 2, 415 A.2d 292, 293 (1980).

100. 43 Md. App. 168, 177 n.6, 403 A.2d 840, 845 n.6 (1979), *aff'd*, 288 Md. 1, 415 A.2d 292 (1980); 288 Md. 1, 2, 415 A.2d 292, 292 (1980).

101. *Martirano v. Frost*, 25 N.Y.2d 505, 508, 255 N.E.2d 693, 694, 307 N.Y.S.2d 425, 427 (1969).

102. See HARPER & JAMES, *supra* note 4, § 5.22 at 696.

103. *Watson v. M'Ewan*, [1905] A.C. 480, 488 (Scot. 1904).

VI. CONCLUSION

*Adams v. Peck*¹⁰⁴ marks a major extension of the immunity that protects potential trial witnesses from suit for defamation. The narrow holding of the *Adams* decision, that a party litigant may not sue a potential adverse witness for defamation based on an informal report to his adversary's attorney, is in line with both American and English decisions. Broader application of witness immunity, however, may be prescribed to include matters published prior to proposed litigation in response to requests by counsel.

Harold Douglas Norton

104. 288 Md. 1, 415 A.2d 292 (1980).