A·D·C VERITAS

# DEFENSE COMMENT

Association of Defense Counsel of Northern California and Nevada – *Serving the Civil Defense Bar Since 1959*

Vol. 34, No. 1 / Spring 2019

**2019 ADC President**
**David S. Rosenbaum**

## STAFF

**CO-EDITORS-IN-CHIEF**
Ellen C. Arabian-Lee
Jill J. Lifter

**EDITORIAL / ART DIRECTION**
John Berkowitz

**CONTRIBUTORS**
Melissa Blair Aliotti, Ellen C. Arabian-Lee, James J. Arendt, Michael D. Belote, Michael J. Brady, John P. Cotter, Patrick L. Deedon, Marie-Ann Ellis, Karen Goodman, Glenn M. Holley, Hyon M. Kientzy, Michele Kirrane, Jeffrey E. Levine, Jill J. Lifter, Renée Welze Livingston, Sara A. Moore, Sean Moriarty, David S. Rosenbaum, Marie Trimble Holvick, Edward P. Tugade, Wakako Uritani, James V. Weixel, Don Willenburg

**ADC HEADQUARTERS OFFICE**
2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833
Phone: (916) 239-4060 / Fax: (916) 924-7323
E-mail: *adcncn@camgmt.com*
*www.adcncn.org*

**ADC HEADQUARTERS STAFF**

EXECUTIVE DIRECTOR
**Jennifer Blevins, CMP**
*jennifer@camgmt.com*

**John Berkowitz**
Publications Director / Graphic Design
*john@camgmt.com*

**Michael Cochran**
Webmaster / IT Manager
*michael@camgmt.com*

**Kim Oreno**
Membership / Education
*kim@camgmt.com*

**Stephanie Schoen**
Special Projects
*stephanie@camgmt.com*

**Tricia Schrum, CPA**
Accountant / Controller
*tricia@camgmt.com*




The price of subscription is included in the membership dues. All other subscriptions are $100.00 per year.





A·D·C VERITAS

# DEFENSE COMMENT

ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA – *Serving the Civil Defense Bar Since 1959*


## FEATURES



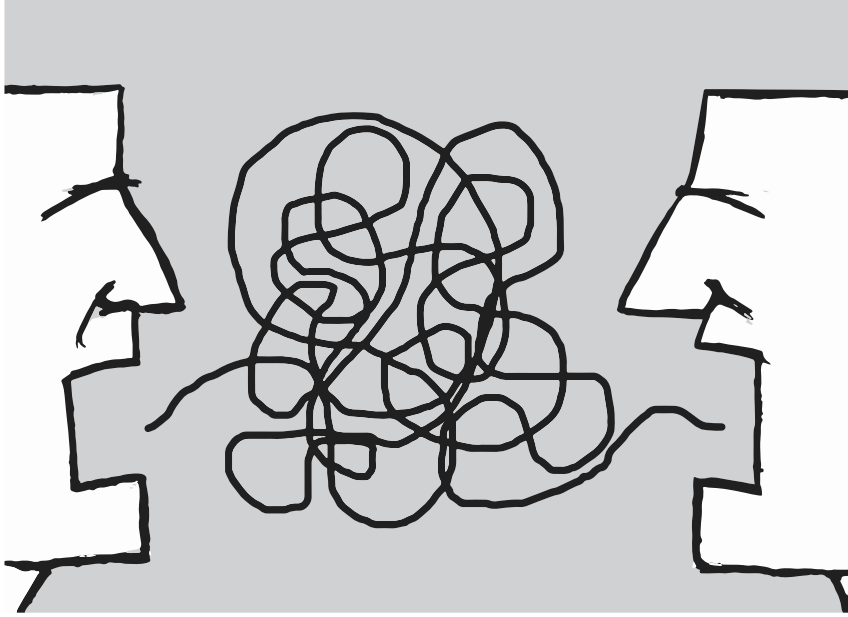
## DEPARTMENTS



***Defense Comment*** **would be pleased to consider publishing articles from ADC members and friends. Please send all manuscripts and/or suggestions for article topics to:**

- **Ellen C. Arabian-Lee**, Arabian-Lee Law Corporation, 1731 East Roseville Parkway, Suite 150, Roseville, CA 95661. Phone: (916) 242-8662; Fax: (916) 797-7404; E-mail: *ellen@arabian-leelaw.com,* and
- **Jill J. Lifter**, Ryan & Lifter, 2000 Crow Canyon Place, Suite 400, San Ramon, CA 94583. Phone: (925) 884-2080; Fax: (925) 884-2090; E-mail: *jlifter@rallaw.com.*

# Court of Appeal Gets to the *Hart* of the Hearsay Rule



**Edward P. Tugade and James V. Weixel**
Demler, Armstrong & Rowland, LLP

Plaintiffs resort to a variety of techniques to support their claims with the contents of documents or other printed material purportedly based on personal knowledge, when it is clearly hearsay. With this tactic, plaintiffs often try to bridge gaps in their causation theory with hearsay evidence. At deposition, an industrial laborer testifies that a particular shipper delivered a hazardous material to a jobsite because he often saw the shipper's logo on trucks at the site. Plaintiffs may also put up an industry expert to state that a manufacturer was responsible for injuries caused by a shattered drill bit because purchasing records showed its drill bits were supplied to a plaintiff's jobsite.

The recent decision in *Hart v. Keenan Properties, Inc.*[1] put a stop to admission of this type of dubious "evidence." In *Hart,* the court ruled it was a violation of the hearsay rule for a plaintiff, Frank Hart, to offer the testimony of his foreman, John Glamuzina, about the contents of invoices and shipping documents to prove that a particular supplier provided asbestos-containing materials to his jobsites.

Glamuzina testified that he saw shipping records indicating Keenan had supplied Johns-Manville asbestos-containing transite pipe to Hart's jobsites in the McKinleyville area in the 1970s. Glamuzina could not recall how the Keenan name appeared on the records, but did recall seeing "their K and stuff" on the records. He claimed that he knew Keenan had supplied the JM pipe to which Hart was exposed because: (1) he checked in all the supplies received for Hart's jobsites; (2) he saw the JM logo stamped on the pipes that Hart used and worked with on the jobs; and (3) Keenan supplied all of the pipe the company used in the McKinleyville area.[2] The records themselves, however, were never offered into evidence at trial.[3] Keenan identified an exemplar invoice as carrying the Keenan logo, featuring a prominent K, yet the company had no record of ever selling JM transite pipe to Hart's employer, nor to any purchaser that used the pipe in McKinleyville.[4]

Keenan moved *in limine* to exclude Glamuzina's testimony about Keenan's supposed shipments of JM transite pipe to Hart's jobsites. Keenan argued that the testimony about the content of the documents was hearsay because it was based on out-of-court statements that were not in evidence. Hart argued Glamuzina had testified from his own personal knowledge, rather than about the content of the invoices, so his testimony was not hearsay. The trial court denied the motion.

The Court of Appeal disagreed and held that Glamuzina's testimony about the content of the documents must be excluded. The court observed that the content of the shipping documents "was an out-of-court statement used to show Keenan supplied asbestos-containing pipes; the statement was offered for the truth of that matter."[5] Accordingly, "Glamuzina's testimony about the identity of the supplier of the pipe was based on hearsay" and was thus inadmissible.[6] That basic premise, the court held, meant the plaintiff could not use a percipient witness's testimony about the content of shipping or purchasing documents to bolster his assertions that he was exposed to a particular defendant's product.[7] The Court of Appeal thus reversed the judgment against Keenan.[8]

*Hart* also cuts off another tactic used by the plaintiffs' bar: using a purported expert to fill in holes in the plaintiff's theory of product identification. The threshold element of a plaintiff's toxic tort case is the requirement of proving exposure to a particular defendant's hazardous product. Since plaintiffs allege decades old exposures to products of long-defunct manufacturers, records of the provision of such products to the plaintiffs' jobsites – as well as witnesses who can authenticate or explain them – are often long gone. Also, recent records may have been destroyed through disaster or ordinary document retention policies. These hurdles leave plaintiffs or their successors with no means of identifying a particular hazardous material as having been at a worker's jobsite, and thus causing that plaintiff to be exposed to harm.

In an attempt to overcome these hurdles, plaintiffs resort to "expert" testimony to prove the offending product was at a jobsite, based on personal recollection of the working environment, the contractors, materials, or suppliers present during the

*Continued on page 11*

relevant timeframe. In asbestos litigation, plaintiffs offer a recurring "expert" who typically testifies – or, more accurately, argues – that he knew that a particular product was in use somewhere on a jobsite while a plaintiff worked there, because he recalled seeing records or trucks or workers from particular suppliers while he was there and he knew that those suppliers provided asbestos-containing products to the shipyard.

*Hart* stands to put an end to, or at least some limits on, the admission of such dubious testimony. As *Hart* makes clear, testimony about the content of delivery records, or about logos or writing on the sides of vehicles, is inadmissible hearsay. Expert witnesses have historically been given a wide berth to rely on hearsay as a basis for their opinions, as professionals often rely upon the knowledge of others to reach their own conclusions.[9] This is the mechanism by which product identification testimony from purported experts has typically been proffered.

Within the last few years, however, the courts have restricted such testimony. The change originated with *People v. Sanchez,*[10] in which the Supreme Court of California held that an expert could not testify to case-specific facts about which the expert has no independent knowledge in the guise of identifying them as the basis of the expert's opinion. The court acknowledged that expert opinion testimony is often elicited through the use of hypothetical questions, in which the expert witness is asked to assume that certain facts are true. That is permissible, however, only where there exists independent competent evidence of those facts. If a hypothetical is based on case-specific facts that exist only in hearsay form, however, the expert cannot be asked to assume that those facts are true.[11] The effect of *Sanchez* is thus to prevent expert witnesses from testifying to case specific facts which are hearsay unsupported by admissible evidence and offering opinion testimony based on such hearsay.

*Sanchez* was a criminal matter, and thus the court concentrated heavily on the implications of the Confrontation Clause in considering the bounds that should be applied to expert opinions and their reliance on out-of-court statements.[12] However, the *Sanchez* court held as a general principle that opinion testimony, to the extent it is based on hearsay, is merely a mechanism for the offering party to put such inadmissible matters before the jury. This is because by offering those matters as support for the soundness of the expert's conclusions, the jury is necessarily being asked to assume that *those matters are true.* That, of course, is in direct conflict with the basic nature and purpose of the hearsay rule. Therefore, the court held, an expert may not express an opinion that is based on case-specific facts that are hearsay in nature.[13]

Since *Hart* did not involve expert testimony, but merely the testimony of a percipient witness, it did not discuss the limitations set down in *Sanchez.* However, *Hart* did hold that evidence regarding the content of shipping records, logos, or other printed material that is not in evidence, but which is offered to prove that a certain company's products were at a jobsite, is plainly inadmissible hearsay. Such evidence was

*Continued on page 12*

being offered in *Hart* to prove case-specific facts – that being the identification of the product allegedly provided by a particular supplier at a plaintiff's jobsite, and to which he was allegedly exposed. That proof, in turn, is often sought to be established through the plaintiffs' "expert" testimony in asbestos and other litigation, in addition to percipient lay witness testimony. This last aspect of plaintiffs' cases in asbestos and toxic tort litigation is where *Sanchez* comes into play, and should require the exclusion of such expert opinions.

Taken together, *Hart* and *Sanchez* should operate to exclude not only percipient testimony about product identification that is based on hearsay, but also expert testimony that seeks to establish that a plaintiff was injured by a particular product. As such, defense counsel may now add these cases to their arsenal to exclude hearsay product identification evidence, and establish a complete defense to plaintiffs' theory of causation.

## AUTHORS' COMMENTS

Having arisen in asbestos litigation, *Hart* will see its effects felt most heavily in that arena. Both authors of this article have decades of experience defending asbestos manufacturers, suppliers, and premises owners, and have seen countless instances in which a plaintiff avoided summary judgment by offering a declaration or deposition testimony from a co-worker or supervisor who gave vague indications of having seen a logo or other printing on jobsite records. Such evidence is often embellished with testimony – usually solicited by plaintiffs' counsel through blatantly leading examination – as "I can't remember specifically, but I know it was there," or "I would assume so, because that's how every job was." Such testimony is exactly what *Hart* now prohibits. Indeed, *Hart* makes clear that hearsay and other unfounded and inadmissible statements will no longer be cognizable.

## ENDNOTES

1 *Hart v. Keenan Properties, Inc.* (2018) 29 Cal.App.5th 203.

2 *Hart, supra,* 29 Cal.App.5th at pp. 205-206.

3 *Id.,* at p. 213.

4 *Id.,* at p. 206.

5 *Id.* at p. 212, citing *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42 (holding that "invoices, bills, and receipts… are hearsay").

6 *Id.* at p. 212, citing *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 681 (package label and instructions bearing a company name constituted hearsay when offered to prove that the package contained that company's product).

7 The court took no issue with the trial court's holding that Glamuzina's testimony about seeing a JM logo stamped on a piece of concrete pipe was not barred by the hearsay rule, as it was personal recollection about what appeared *on the product itself.* However, that analysis clearly did not apply to *documents* purportedly containing the name of the product's supplier, but which were not in evidence. (*Hart, supra,* 29 Cal. App.5th at p. 212.)

8 *Id.* at p. 216.

9 See, e.g., *People v. McDowell* (2012) 54 Cal.4th 395, 429.

10 *People v. Sanchez* (2016) 63 Cal.4th 665.

11 *Sanchez, supra,* 63 Cal.4th at pp. 676-677.

12 *Id.* at pp. 679-682.

13 *Id.* at p. 684.

**Edward P. Tugade**

*Edward P. Tugade, a partner in Demler, Armstrong & Rowland LLP's San Francisco office, represents corporations, businesses, and partnerships in trials, arbitrations, hearings, and mediations in federal and state courts. His practice involves environmental, toxic tort, product, premises, and general liability claims, partnering with clients to understand their company and culture in order to effectively provide the best solutions for all of their legal and business needs. He is a decorated combat veteran of the U.S. Marine Corps, receiving an honorable discharge after 10 active duty years of military service.*

**James V. Weixel**

*James V. Weixel, also with Demler's San Francisco office, defends the firm's clients in insurance bad faith and third-party property and casualty litigation, as well as asbestos personal injury and wrongful death cases. He has participated in a wide array of trial and appellate litigation for corporate, public entity and individual clients in California and Ohio since 1990. He is the president of the Irish American Bar Association of Northern California and has fulfilled a number of other leadership roles in other professional and civic organizations in California and the Bay Area.*