

# FIREPOINT



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# Firepoint

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**FIREPOINT: IF YOU HAVEN'T PAID YOUR FEES FOR THE  
CURRENT YEAR, PLEASE DO SO NOW.**

## EDITORIAL

Reports from the major Victorian and Queensland seminars are included in this issue.

The follow up to the article by Richard Woods in our last issue has been held over, and will be in our next issue.

This issue features some recalls. There are some more which will also be in our next issue.

I have included the statement made by U. S. President Barack Obama on Fire prevention Week.

So you have something to read, and something to look forward to.

I wish all members a happy holiday season. I hope the bushfire season will be uneventful.

*Wal Stern*



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## **Victorian Association of Fire Investigators Inc.**

**Website** [www.vicfire.com](http://www.vicfire.com)

### **VICTORIAN MEMBERSHIP**

The committee reports that VAFI has 151 financial members with still some more renewals to be registered. The committee welcomes the following new members: Kerrie Hicks VICPOL, Craig Farrant, Ashley McGraw CFA and Greg Clifford CFA. The new Membership Database on the website has been trialed and will be updated and running shortly. The Committee has now determined the format for Corporate Membership of VAFI and anyone interested should contact a committee member.

### **NORTHERN DISTRICT TRAINING DAY**

Members of VAFI ventured into country Victoria to CFA Huntly Training Ground (near Bendigo) on Friday 28 August 2009 where 110 members attended.

The theme of the day was of a practical nature and the two groups went through four presentations. Michael Weekes and Russell Lee provided a talk and demonstration of investigation of electrical related fires and their causes using the magic house board to show wiring and how it works. CFA Officer John Cutting gave an informative talk on Caravan fires showing graphic photos and what is left for the investigator. Norm Jackson gave a talk on gas related fires and the problems with different gases. All of these presentations showed the practical aspect of investigation and the common problems encountered by

investigators. Then there was Brian Neal and Trevor Pillinger who showed everyone how many times you can set fire to a car if you know how to do it. The aim was to show burn patterns and fire travel and how to interpret them using the basic principles to find the point of origin. Both enjoyed doing this too much.

The day was well received by all who attended and the weather was perfect. Many members had come from all over the state but our furthest member Scott Carrigan had come from Darwin for the session. This now means that VAFI has members in all States & territories in Australia and New Zealand.

From the Committee many thanks to the support and friendship of all the staff at CFA Huntly and hope to return to do some more burns. Apart from one presenter the rest of the instruction was under taken by your committee members showing the talent and experience within your committee.

### **OCTOBER CONFERENCE & AGM**

Future Trends & Advancements in Fire Investigation was held at the Veneto Club Bulleen Road Bulleen on Monday 26<sup>th</sup> October. The day consisted of presentations and included the Chapter's AGM attended by about 105.

After the welcome Supt. Paul Hollowood took us through the Black Saturday

Bushfires with respect to the formation and conduct of Operation Phoenix.

Phoenix Task Force covered six Operations namely Angora, Croove, Winston, Elects. Spense and Phylon. He discussed the Phases of the investigation, presentation of evidence and the need for centralization of certain parts of the investigation. The presentation overlaying evidence and information using of computer programs for court was developed and has proven itself. He also discussed future approaches to these types of large investigations.

Pier 35, a case study of a marine explosion was presented by S/C Lynden Blackey - Water Police, Andrew Kerr - AES and George Xydias - VPFSC showing the different approach to the investigation of the explosion from the different areas. How do you collect evidence floating down the river? This lead into a presentation by Tony O'Connell on marine investigations.

Jim Munday presented two sessions one on Interpretation of Thermal Injury and Damage to Persons in Fire (a well chosen subject before lunch). Interesting the ways people can burn themselves, but showed how to disprove or prove how it was done. The other was The Unimaginative Arsonist v. Lateral thinking Investigator. Both sessions were entertaining and informative. To complete the presentations Christine Nixon of the Victorian Bushfire Reconstruction Authority spoke about the challenges heading up this Authority and the progress of the restoration of the towns. One of the problems set was how do you equally divide up 110 electric refrigerators between the 2,000 odd houses destroyed. Very good overview and the tested new processes introduced.

The last two speakers in Debbie Smith and Julie Harris presented different but the same view on the changing customer base for fire brigades and fires. The increase in the aged population and their traits and also the experience of hoarding and its effects on fires and deaths.

The day was completed with a dinner attended by about 70 who were entertained again by Jim Munday with his experience of a British Antarctic Survey Fire Investigation. How to investigate a fire under 3 metres of snow and to have some positive results.

From the committee thanks to all the presenters and a special thank you to Jim Munday being the guest speaker. Thanks to our sponsors for the Conference being Johns Lyng Group, Masson for Light, Chubb - Fire & Security, Retravisoin, Testequip P/L and Gloria Jeans - Werribee. Thanks should also be extended to all those members who supported the day.

## **VAFI AGM**

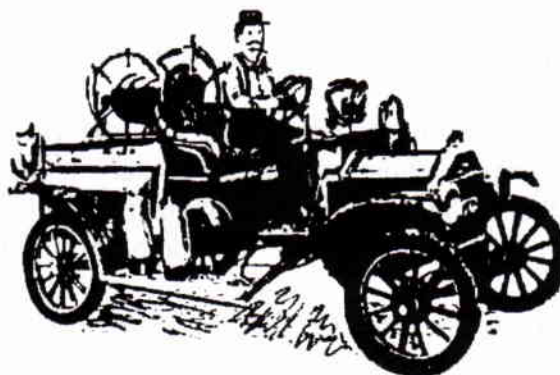
During the Conference the Annual General meeting was held and we would like to congratulate Andrew Kerr as being returned as President. There were some changes though, in that Trevor Pillinger our Secretary has stepped down after 7 years in the chair and George Cooney has taken on this role with support from Belinda Webb. Trevor still remains as a committee member. After two years on the committee Ian Hunter has stepped aside and Geoff Fletcher has taken position on the committee.

Ian is continuing to support the committee with the Membership Database set up and helping out in membership till Alex Conway

returns from leave. Once on the committee it's hard to leave.

#### **VAFI COMMITTEE 2009/2010**

|                  |                |             |
|------------------|----------------|-------------|
| President -      | Andrew Kerr    | VICPOL      |
| V President -    | Brian Neal     | CFA         |
| Secretary -      | George Cooney  | VICPOL(rtd) |
| Treasurer -      | Rod East       | MFB         |
| Committee -      | Michael Weekes | ESV         |
| Belinda Webb     | INS            |             |
| John Lording     | INS            |             |
| Trevor Pillinger | EDUC           |             |
| George Xydias    | VICPOL FOR     |             |
| Karen Ireland    | VICPOL FOR     |             |
| Norm Jackson     | ESV ( Retired) |             |
| Russell Lee      | INV            |             |
| Scott Barnes     | VICPOL         |             |
| Nicole Harvey    | CFA            |             |
| Geoff Fletcher   | MFB            |             |



## **Presidents Annual Report 2009 (presented at the AGM)**

The Black Saturday Bushfires of 7<sup>th</sup> February 2009 have left an impact upon us all. There is not one person in this room who has not been affected by the fires in some way. Whether you have been directly impacted through the loss of loved ones and friends, to losing property, to directly fighting or investigating the fires or helping to clean up afterwards, or assisting the Royal Commission or simply having been effected by the in depth media reports. Images and stories have been forever imprinted in our memories. We in the Fire Investigation industry know full well the impact these fires have had on many thousands of people. Our thoughts go out to those who have suffered so much. Our organisation and the organisations we represent are charged with the onus of continuing to do what we can to prevent such fire events, prepare for response to such fire events and increase community and fire fighter safety.

Despite the turbulent events the VAFI have had an extremely good year. Our membership is on the increase and is sitting at approximately 180 fully paid up members with many more names on our books. It continues to be very problematic for us to keep members financial. I suspect this is due to our lack of ability to keep track of people. I will discuss this in greater depth later. Not only do we have members from across the State, from a range of organisations (both government and non government) but we have a number of interstate and international members. We have new members from Tasmania, Northern Territory, New Zealand (Fire Service and Police) and now Fiji. The committee of management have gone to great lengths to ensure that the membership get full value for their financial commitment. To that end we have continue to produce quality information and training sessions at regular intervals throughout the year. On many occasions these events have been at little or no further cost to the members and always include snacks or light meals and refreshments.

We conducted an extremely well attended information session on the new Coroners Act and its effect of fire investigation. This was delivered by the very informative and highly respected Catherine Dunlop, partner with Maddocks Law Firm.

Another information/training session was held at the Victorian Forensic Science laboratory in Macleod. Members heard from scientists, crime scene examiners and photographers and we learnt about correct sampling techniques and the capabilities of the lab. This was extremely well attended and the first time we actually had to enforce the cut off rule.

More recently as a part of the committee's commitment to the membership we conducted a full training day held outside Bendigo at the CFA Northern Training Ground in Huntly. This day comprised of sessions in gas and electrical fires, vehicles fires and caravan fires. We had the opportunity to witness a number of live burns and were able to visualise and interpret burn patterns. The 100+ attendees also enjoyed a sumptuous BBQ lunch and had the opportunity to network as well as catch up with old friends and colleagues. The feedback we

had from this day was extremely positive. Our thanks go to the CFA and in particular the staff and management of the Northern Training Ground for their support.

Finally, to the annual conference being presented here today. The quality of the speakers and the range of topics covered again is very impressive and I am sure all would agree represents very good value for your small investment.

This year the VAFI has awarded its first scholarships. A substantial grant was awarded Station Officer Graeme Davie of the New Zealand Fire Service. All members are invited to apply for a \$1000 grant to assist with expenses in relation to attendance at an appropriate course/training activity.

This year we have welcomed a new member to the committee of Management in Detective Senior Constable Scott Barnes. I am very pleased that the Arson and Explosives Squad continues to be represented. Scott is a dedicated member who has developed a great interest in fire investigation. His vibrant personality and can do attitude is a very welcome addition.

The committee of management has explored our options for the development of and ways to manage our membership database. I am pleased to report that we have settled on a company that will be providing us with a web based membership database that should assist us greatly in keeping track of our members and streamlining the renewal and communication processes.

The subject of National Conferencing has been discussed for some time. Again I am pleased to report that planning and arrangements for the National Conference in 2010 in Sydney are well under way. The VAFI continues to support the concept and has committed to providing significant financial assistance. There are still some details to work out in this regard. I encourage you all to provide feedback to the committee of suitable speakers and topics for inclusion in the National Conference.

I would like to thank all members of the committee for their continued efforts. Particularly this year everyone has been extremely busy but they continually give up their own time and resources and selflessly commit to the ideals of the association and making it work. In particular I would like to thank Ian HUNTER of the MFESB FIA and Nicole HARVEY of the CFA for their continued support. I would like to thank Mr Trevor Pillinger for his continued dedicated service on the committee particular in his role as secretary over the last few years. Trevor has now decided it's time to hand over that role and nominations have been received for the new secretary to be decided here today.

Andrew Kerr



## Queensland Chapter

### Presidents Report: Brian Richardson

The Queensland committee are reviewing the current constitution to ensure it is still relevant and workable. Any Queensland members who wish to put forward views on the current constitution, and or changes that may be considered necessary or beneficial, are asked to email the QAFI at [QAFI@uttinglibke.com.au](mailto:QAFI@uttinglibke.com.au)

The revised constitution will be put to the next Annual General Meeting to be held in late February/early March 2010. Details of the confirmed date and location will be sent to members in the New Year.

Queensland held its one day seminar - **Arson, Fraud, Legal Actions and Burden of Proof** on 10 September 2009 at the Queensland Fire and Rescue Service (QFRS) auditorium in Kedron.

The QAFI gratefully acknowledges the support of the sponsors of this event – **Bay Building Services** and **Insight Restorations**.

More than 90 people attended, with a strong representation from QFRS Fire Investigators as well as people from insurance companies, loss adjusters, electrical inspectors, private investigators and other related fields.

The day started with an excellent presentation by the QAFI honorary solicitor Quentin Owen on the “Onus of proof”. Quentin eloquently put the onus of proof, also known as the burden of proof, as “*the obligation to prove the case that is alleged*” and “*the method of fulfilling the burden is the presentation of evidence*”. This topic

gave all fire investigators a good reminder of the need to ensure their investigation and processes are complete and professional. Logically following Quentin’s presentation was a session by Karen Murray of the Queensland Police Service on evidence gathering and evidence continuity. Karen explained the aspect of continuity of evidence that “*the court must be provided with accurate information of the packaging / movement and handling of every exhibit from its original “in-situ” location to the location at the time of the court proceedings. This information establishes the continuity or chain of custody of an exhibit*”.

Chris Markwell of the QFRS stepped in to replace a speaker who couldn’t make the day and talked about the QFRS protocols when dealing with a fatal fire investigation (linking to the legal actions of coronial inquiries). Chris handled the sensitive topic very well, gave a thorough and professional presentation and captured everyone’s attention.

A session on interview techniques by the lads from the Arson squad had everyone engaged. The “practical tests” they gave us reinforced that witnesses that appear to give different accounts of the events may not be deliberately misleading your investigation, just remembering as best they can their view of what happened. For those who where there all I can say is “Monkey? What monkey?”

Several case studies rounded out the practical application of the theory presentations giving a good balance to the

day. Maurie Tong detailed the evidence of arson and fraud in a motor vehicle fire. Gary Nash and Ross Morson giving practical explanation of a fire scene examination and subsequent lengthy and frustrating court actions and appeal processes that can occur. An investigation of a fire caused by down lights overheating and subsequent prosecution by the Electrical Safety Office was presented by Adrian Pearce and Trevor Little.

The day concluded with a viewing of "The Witness Video - Coronial Inquest" a product from the QAFI of a few years ago. While a little dated (embarrassing hair styles and clothes aside) it still gave a good account of a coronial inquest process and courtroom proceedings.

The QAFI appreciates the support of the Queensland Fire and Rescue Service and the sponsor companies, Insight Restorations and Bay Building Services, which assist in enabling these types of days to go ahead.

This one day seminar capped of a good year from the QAFI committee for its members, and builds on the work of many years of dedicated and committed people, to foster the feeling of community and the working relationships between the various organisations and people involved in fire investigations. As president, I would like to thank the 2009 committee, secretariat and honorary solicitor for their time, effort and wisdom over the year.

On behalf of the QAFI committee I wish everyone a safe end to 2009 and a prosperous 2010.

## US FIRE PREVENTION WEEK

As powerful as any force in the natural world, fire deserves our utmost attention. Unchecked, fire can destroy homes, devastate our environment, and, at its worst, injure or fatally harm individuals. Fire Prevention Week is a time to learn about important fire safety issues and empower our communities to stay "Fire Smart." It is also a time to honor our Nation's brave firefighters and volunteers who risk their lives to protect their fellow Americans.

Every year, thousands of Americans experience fires in their homes and workplaces. We can greatly reduce these tragedies by taking a few, very simple steps. For example, if each of us strives to remain attentive while cooking, to properly dispose of all smoking materials, and to regularly check and replace smoke alarm batteries, we can help keep our families safe from harm and protect personal property. Additional precautionary measures should also include the formation of an emergency plan and the education of our children about the proper ways to handle potentially dangerous situations with fire.

This week's theme, "Stay Fire Smart! Don't Get Burned," focuses on increasing burn awareness and prevention. We can each do more to avoid severe burns by testing water temperature, remaining aware of open flames, and ensuring that heating elements -- such as those in electric stoves, toasters, hair appliances, and space heaters -- are secure and operated properly. These easy, common sense practices can help Americans avoid suffering painful burns.

Fire can have a devastating impact on the life of an individual or family, and it can have far-reaching financial and human consequences. Wildfires can burn hundreds of acres and affect numerous communities, while household fires can spread to neighboring buildings. These and other emergency situations can endanger the lives of not only the public, but also our rescue workers and firefighters. During Fire Prevention Week, we are reminded of the dangers of fire, we honor the brave men and women who protect us from it, and we recommit ourselves to its responsible use.

Barack Obama  
U.S. President



**NSW ASSOCIATION OF FIRE  
INVESTIGATORS INC**  
(IAAI CHAPTER No.47)

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## **President's Report**

As we come to the end of 2009, many events have taken place throughout the year and for all of those people involved in the Association, may I pass on my congratulations for your efforts and continued focus on taking the Association further.

Since the last issue, the National conference has progressed rapidly with a number of suggestions coming forward in relation to the content of the conference in 2010. Can I encourage all of us to continue, as we circulate in the various industries in which we are involved, to consider other people who might be excellent presenters on various topics associated with fire investigation for the Conference and provide them to the committee for consideration. I am sure that with the co-ordinated efforts that I have been able to peruse circulating between the e-mails and the numerous telephone calls between the various states of Australia and New Zealand that we are looking forward to an excellent conference next year.

On a sad note, can I report to you the death of Arthur Donnelley I do not wish to labour too long on Arthur's association with many of the investigators and personalities surrounding the fire industry and more particularly the insurance industry where on

numerous occasions, Arthur was identified as 'the expert' in gas related matters. On behalf of the Association, I attended Arthurs funeral.

For those of us who had the opportunity to meet Arthur, I am sure that we all have a smile on our face as we reflect upon the times that we spent with him generally trying to dodge the smoke developing from his incessant relighting of his pipe, all the time continuing with his prowess as a raconteur, not only discussing the issues related to the matters of gas that he was probably present for, but the numerous anecdotal stories that he associated with them. From an industry point of view, we rarely today have the opportunity to meet someone with a passion for a profession which had continued through his family for three generations. From a personal point of view, I am sure we will all miss Arthur and have fond memories of the times we were able to spend with him.

May I take the opportunity to wish all of you and your families a very happy and joyous Christmas and in doing so, thank you for your support throughout the year. I look forward to seeing you at our functions and the continued development of the Association throughout 2010.

## Onus of Proof

### A Paper Presented to the QAFI seminar *Arson, Fraud, Legal Actions, Burden of Proof*

Quentin Owen

#### ONUS OF PROOF IN CIVIL AND CRIMINAL CASES

##### **1. WHO BEARS THE ONUS OF PROOF IN A LEGAL CASE?**

- 1.1 The onus of proof, also called the burden of proof, is the obligation to prove the case that is alleged. The method of fulfilling the burden is the presentation of evidence.
- 1.2 In criminal cases, the prosecution bears the burden of proof. In civil cases, the burden of proof rests on the plaintiff.
- 1.3 There are some exceptions to these general rules about where the burden of proof lies, such as when a defendant in a criminal case raises certain defences or where a defendant in a civil case raises arguments such as failure on the plaintiff's part to mitigate his or her loss.
- 1.4 There are some matters that require no proof. The Court may take judicial notice of a fact if it is so generally known that every ordinary person may reasonably be presumed to be aware of it, in which case the fact can be deemed proven without any evidence having been presented to the Court. Examples might include the standards of weight and measure in Australia, the name of the current Prime Minister or the individuality of fingerprints.

##### **2. WHAT STANDARD OF PROOF IS REQUIRED IN CIVIL CASES?**

- 2.1 The standard of proof required in civil law cases is on the balance of probabilities. The plaintiff in a civil case must prove his or her case to that standard.
- 2.2 The relevant question is, is it more probable than not that the alleged events occurred? The allegations are proved if and when the conclusion is

reached that there is a balance of probability in their favour.

- 2.3 If a person is acquitted of a criminal charge, he or she does not gain any automatic protection against civil liability. A party to a civil case seeking to establish the commission of a crime as part of the case only needs to meet the ordinary civil standard of proof – the balance of probabilities.
- 2.4 Section 79 of the *Evidence Act 1977* (Qld) provides that in any civil proceeding (except for an action for defamation) the fact that a person has been convicted of an offence – whether by a plea of guilty or not, and whether or not a conviction was recorded – is admissible in evidence for the purpose of proving, where to do so is relevant to any issue in that proceeding, that the person committed that offence.
- 2.5 Section 79 also provides that in any civil proceeding (except for an action for defamation) in which by virtue of the section, a person is proved to have been convicted by a Court of an offence, the person shall be taken to have committed the acts and to have possessed the state of mind (if any) which at law constitute that offence, unless the contrary is proved.
- 2.6 Under the *Evidence Act 1995* (Cth), subsection 91(1) provides that evidence of a decision or finding of fact in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding. Subsection 92(2) provides that in a civil proceeding, subsection 91(1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence – so long as the conviction has not been quashed or set aside, a pardon has not been given and, a review or appeal in respect of the conviction is not pending determination.



### **3. WHAT STANDARD OF PROOF IS REQUIRED IN CRIMINAL CASES?**

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- 3.1 The prosecution must prove all the essential elements of the offence beyond reasonable doubt. This does not mean that every fact and every piece of evidence relied upon to prove an element must be proved beyond reasonable doubt.
- 3.2 The prosecution is only required to prove the location of the crime (eg. Queensland as opposed to New South Wales) to the civil standard.

#### ***Reasonable doubt***

- 3.3 Reasonable doubt should be found where there is any reasonable possibility that the accused is not guilty – that is, where any other inference consistent with the innocence of the accused is reasonably open on the evidence.
- 3.4 If the judge decides that no reasonable jury, properly instructed about the law, could be satisfied beyond reasonable doubt about the guilt of the accused, the case will not be permitted to go to the jury to decide.

#### ***Defences***

- 3.5 Because the prosecution must prove the guilt of the accused beyond reasonable doubt, it must also disprove any defence raised by the evidence, beyond reasonable doubt – with the exception of the insanity defence.
- 3.6 At common law and under the criminal law, there is a presumption of sanity. The accused bears the onus of proving insanity. It is not a matter for the Crown to prove that the person was sane. The presumption of sanity can be rebutted with evidence of insanity to the civil standard – on the balance of probabilities. There have been calls for the onus of proof rules for insanity to fall into line with other defences (ie. forcing the prosecution to disprove the accused's claim of insanity beyond reasonable doubt), on the basis that the rule discriminates against those with mental illness.
- 3.7 When the defence bears the onus of proof in a criminal case, it is only required to meet the civil standard. If a positive defence is mounted – such as provocation, self-defence or accident – the accused bears an evidential onus to put forward or point to sufficient

evidence to raise the defence as a real possibility. If there is not sufficient evidence to raise a defence for consideration by the jury, or if the judge decides that no reasonable jury could be satisfied on the balance of probabilities that the defence has been established, the jury will not be permitted to consider the defence.

- 3.8 In practice, it is often the case that it is sufficient for the defence to raise a defence on the basis of quite limited evidence to shift the burden to the prosecution to rebut the possibility of the defence beyond reasonable doubt. In matters where the evidence suggests the possibility of provocation or self-defence, the judge must give the jury a direction, whether or not the accused raises one of these defences.

#### ***Criminal responsibility of children***

- 3.9 In Queensland, there is an irrebuttable presumption that children under the age of 10 are not criminally responsible, and a rebuttable presumption that children aged 10 to 15 years are not criminally responsible. The prosecution must rebut the presumption beyond reasonable doubt.

#### ***Parliament may alter the standard the accused must meet***

- 3.10 Parliament may place on the accused a higher standard of proof than the civil standard, and has done so in very limited circumstances.
- 3.11 For example, section 34 of the *Dairy Produce Acts 1920-1963* (Qld) provided, quite extraordinarily, that allegations of offences under the Act in a prosecution formed conclusive evidence of the allegations, in the absence of rebuttal evidence beyond reasonable doubt.

### **4. EXCEPTIONS TO THE GENERAL RULE ABOUT ONUS OF PROOF IN CIVIL CASES – SOME EXAMPLES**

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#### ***Failure to mitigate loss***

- 4.1 In civil insurance claims under any type of insurance policy, the onus of proof lies with the plaintiff to show that the event (eg. motor vehicle accident) caused his or her loss. The standard is the balance of probabilities.
- 4.2 The claimant must take all reasonable steps to mitigate (ie. minimise) the loss.

Their personal injury damages may be reduced if they have not undertaken appropriate medical treatment or rehabilitation, if they have not taken appropriate steps to return to work or if they are not attempting to gain new employment where that action would be reasonable in the circumstances. If the defendant alleges that the plaintiff failed to mitigate their loss, the onus will be on the defendant to establish that case to the civil standard.

### ***Intoxication and contributory negligence***

**4.3** Contributory negligence in personal injury matters means that the plaintiff has failed to take reasonable care for his or her own safety, which contributes to the harm he or she suffers.

**4.4** Section 48 of the *Civil Liability Act 2003* (Qld) provides a presumption of at least 25% contributory negligence on the part of a person who is aged 16 or over and suffers harm, if they were relying on the care and skill of another person whom they knew (or ought reasonably to have been aware) was "intoxicated" when they were harmed. Under the Act, intoxication means "that the person is under the influence of alcohol or a drug to the extent that the person's capacity to exercise proper care and skill is impaired".

**4.5** There is an additional presumption of contributory negligence under section 49 where if the person was injured as a passenger in a motor vehicle and the driver:

- (a) had a blood alcohol concentration of 150mg or more of alcohol in 100mL of blood; or
- (b) was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle,

the plaintiff's damages award is to be reduced by a minimum of 50%.

**4.6** Once intoxication is raised, the onus of proof falls on the plaintiff. The plaintiff is not required to prove that the driver was not intoxicated. However, the plaintiff can rebut the presumption of contributory negligence if he or she can establish, on the balance of probabilities, that:

- (a) the defendant's intoxication did not contribute to the breach of duty; or
- (b) the plaintiff could not reasonably be expected to have avoided relying on the defendant's care and skill.

**4.7** In practical terms, let's consider a personal injuries claim brought by a passenger in a car full of 17 year olds who have been drinking. The personal injuries claim would be brought against the driver and the compulsory third party insurer. For the insurer to successfully advance a defence under the intoxication provision of the *Civil Liability Act* (and therefore reduce the damages bill by a minimum of 25%) it must present evidence that establishes the intoxication of the driver, on the balance of probabilities.

**4.8** Ideally, it will be able to present evidence of the plaintiff's blood alcohol concentration at the time of the accident. If this is not available (and sometimes it is not available because the driver has absconded or the driver's medical condition prevents a blood sample being taken), the insurer will consider obtaining alternative evidence.

**4.9** Alternative evidence is likely to include statements from people in whose company the driver was drinking and expert evidence about the likely impact on the driver's ability to exercise effective control of the vehicle, having consumed the amount of alcohol the witnesses say he/she did.

### **5. WILL A 51% PROBABLE CASE WIN?**

**5.1** What does the balance of probabilities standard in civil cases really mean? Does a plaintiff merely need to show that the likelihood of their case is more than 50% likely? Or does the Court need to be satisfied about what happened?

**5.2** In a fair trading or product liability case, if 51% of a particular brand and type of heating unit were shown to be defective, in the absence of any other evidence, it is technically possible to say that a plaintiff had established on the balance of probabilities that his or her particular heater of that brand and type was defective.

**5.3** However, if the Court needs to be satisfied that a particular heater was

defective, it would need to be confident in more than an estimate of probabilities – it would need to have a subjective belief in the facts of the case.

5.4 In Australia, the answer is that the Court needs to be subjectively satisfied. The statistical evidence alone would not be sufficient to decide the heater case.

5.5 In the landmark case of *Briginshaw v Briginshaw* in 1938, a man sought a divorce on the ground of adultery. The trial judge was uncertain about whether or not adultery had occurred, and dismissed the husband's application. He said that if the case was a civil one, he might well consider the probabilities were in favour of the husband, but that he was not satisfied beyond reasonable doubt of the adultery.

5.6 The husband appealed to the High Court, which found that the correct standard of proof was the balance of probabilities. Justice Dixon delivered the leading High Court judgment. He said that there is no standard of proof sitting between the criminal and the ordinary civil standard, and that the jury must be satisfied about the facts required to be proved:

*The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.*

*But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

5.7 The Court was unable to form a firm conclusion that adultery had taken place. Whilst the evidence gave rise to grounds for suspicion, it was not enough to satisfy a reasonable mind that the allegations of adultery were true. The appeal was dismissed and the husband was not entitled to a re-trial.

5.8 The 'Briginshaw test' is that the Court should satisfy itself as far as it reasonably can. The standard is flexible according to the seriousness of the case - the more serious the allegation, the higher the level of satisfaction needs to be.

5.9 In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66, Mason CJ, Brennan, Deane and Gaudron JJ said:

*The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud.*

*On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'.*

*Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

## 6. WITHHOLDING REASONABLE DOCUMENTS - SUSPICION OF FRAUD

6.1 A considerably difficult area of motor accident insurance and personal injuries proceedings work involves investigation of possible fraud and other offences under the *Motor Accident Insurance Act*,

and withholding documents from the claimant where fraud on their part is suspected.

6.2 There are competing aspects of public policy between the provisions of the Motor Accident Insurance Act requiring disclosure of documents, and the provisions of the Uniform Civil Procedure Rules and related decisions, such as *Parr v. Bavarian Steakhouse* and the requirement not to alert an offender to detection of alleged offences.

6.3 The Courts have swung the evidence provision to such an extreme that there is very little that can be withheld from a claimant under the legislation.

6.4 Under the CTP legislation, an application to the Court is not required to withhold documents in the pre-litigation stage. The *Personal Injuries Proceedings Act 2002* (Qld) requires an application to be made.

6.5 Section 47 of the Motor Accident Insurance Act 1994 provides that:

(1) *The insurer must cooperate with a claimant, and, in particular -*

(a) *must provide the claimant with copies of reports and other documentary material in the insurer's possession about the circumstances of the accident or the claimant's medical condition or prospects of rehabilitation; and*

(b) *must, at the claimant's request, give the claimant information that is in the insurer's possession, or can be found out from the insured person, about the circumstances of, or the reasons for, the accident;*

(2) *If the claimant requires information provided by an insurer under this section to be verified by statutory declaration, the information must be verified by statutory declaration.*

(3) *If an insurer fails, without proper reason, to comply fully with the request under this section, the insurer is liable for costs to the claimant resulting from the failure.*

6.6 Section 48 provides:

(1) *A claimant or insurer is not obliged to disclose information or documentary material under this Division*

*if the information or documentary material is protected by legal professional privilege.*

(2) *However, investigative reports, medical reports and reports relevant to the claimant's rehabilitation must be disclosed even though protected by legal professional privilege but they may be disclosed with the omission of passages consisting only of statements of opinion.*

(3) *If an insurer has reasonable grounds to suspect a claimant of fraud, the insurer may withhold from disclosure under this Division information or documentary material (including reports that would, apart from this subsection, have to be disclosed under subsection (2)) to the extent the disclosure would alert the claimant to the discovery of the grounds of suspicion or could help in the furtherance of fraud.*

(4) *An insurer must not withhold information or documentary material from disclosure under this Division without having proper grounds.*

6.7 Subsection 30(3) of the *Personal Injuries Proceedings Act 2002* (Qld) provides that if a respondent has reasonable grounds to suspect a claimant of fraud, the respondent may apply, ex parte (ie. without notice), to the Court for approval to withhold from disclosure information or documentary material that would alert the claimant to the suspicion or could help further the fraud, that would otherwise have to be disclosed.

6.8 The first decision to my knowledge about withholding documents on the basis of reasonable suspicion of fraud was that of Judge Noud delivered 16 October 1998, in the decision of *Murray -ats- Nominal Defendant*. Murray was a pedestrian allegedly struck and injured by an unidentified motor vehicle at night. In his notice of claim form, he swore that he had not consumed any alcohol or drugs in the lead-up to the accident.

6.9 Investigations carried out by the CTP insurer clearly showed contemporaneous medical evidence in the ambulance report and the hospital records that he had consumed a considerable amount of alcohol.

6.10 The Court commented that it has to decide such an issue on the materials



presented to it – namely, affidavit material. The Court accepted the appropriateness of the totality of the material being shown to the judge (but not to the claimant's lawyers) who could look at the material and form a view from reading the withheld material.

- 6.11 His Honour found that the suspicion of fraud held by the respondent was reasonable and that disclosure of various documents would disclose the grounds for the belief of the suspicion and ought not to be disclosed. The Court emphasised the proviso that the entitlement to withhold documents is only open to the extent that disclosure would alert the claimant to the discovery of the ground of suspicion of fraud or could help in the furtherance of fraud.

- 6.12 The decision of *Young -ats- The Nominal Defendant* was originally a chamber application before Judge Samios in the Rockhampton District Court. Judgment was delivered on 10 September 1999 which the Nominal Defendant appealed. The appeal judgment was delivered on 1 February 2000. The Court of Appeal and judge at first instance placed extremely high emphasis on the evidence that is required for a "reasonable suspicion of fraud".

- 6.13 Even though what is required is a "reasonable suspicion", not that the person has a belief of actual fraud being committed, the Court found that the suspicion held by the Nominal Defendant, and its solicitors, was not "reasonable" notwithstanding that in a claim involving an alleged forcing off the road of the claimant's vehicle by another vehicle:

(a) the ambulance service made an entry that the plaintiff had blown a tyre, causing the vehicle to go out of control and hit a tree – the notes contained no reference to involvement of another vehicle;

(b) the hospital records contained entries there was a motor vehicle accident and a tyre blew out;

(c) there was material from the GP and hospital stating that it was a single vehicle accident;

(d) there was a reference in the outpatient's notes that the claimant had

the accident after a night of no sleep and had rolled the car;

(e) there was an entry in the records that this was a single vehicle accident and the claimant had had an argument with her daughter and she had driven to Rockhampton looking for her daughter and the accident occurred after this;

(f) there was an entry in the hospital records that the claimant was intoxicated and needed restraint; and

(g) in the notice of claim, the claimant admitted to drinking one beer before the accident.

- 6.14 Judge Samios placed great weight on the fact that the claimant had made a statement at the accident scene of "another car". There was no allegation made at the accident scene or any other contemporaneous material of the other driver being negligent, or in any way being responsible for the accident, even if there was another vehicle.

- 6.15 The Chamber Judge expressed considerable concern about the suggestion of looking at the withheld material and forming a view. This is notwithstanding the procedure that had been adopted in two earlier cases including that of a Supreme Court judge in similar circumstances. Furthermore, this is a procedure that is regularly adopted by Courts in this State in matters involving for example disputed documents on disclosure – the procedure is the documents are handed up to the Court, and not shown to the party seeking copies of them, for the Court to view the documents and form its own decision.

- 6.16 Judge Samios noted that the defendant had in fact disclosed to the claimant a considerable amount of information and that it was not a case where the totality of the documents had been withheld. His Honour speculated that "What the plaintiff alleges ... as having led up to her personal injuries is not inconsistent with what may be recorded in other documents ... there may be a justifiable explanation for so called "omissions" of references to another vehicle."

- 6.17 His Honour went on to say:

*It may be that a Judge at a trial of this matter would draw the conclusion the defendant submits ought to be drawn on the evidence to date. It seems to me*

*to then to suspect the plaintiff of fraud is choosing between the evidence available. That is, suspecting what one wants to suspect rather than being entitled to have reasonable grounds to suspect the claimant of fraud. That is, the statement to the effect that no one had received an allegation specifically from the claimant at the accident scene about being run off the road by another vehicle, is not in my opinion correct.*

*Although the only words that Ms Scantlebury states were spoken by the plaintiff were "another car", in the context of this matter, I do not think that one can reject that statement at this stage. That others have recorded information that does not specifically refer to "another car", does not in my opinion, mean there was no other car. Further, the expert opinions are only opinions that may or may not be incorrect. I consider Ms Scantlebury's statement cannot be rejected at this stage on any basis.*

- 6.18** The Nominal Defendant appealed to the Court of Appeal, which dismissed the appeal. The reasons for the decision of the Court of Appeal were not very detailed. There was a considerable body of other evidence quite apart from the absence of the specific reference to another vehicle being responsible in some way for the accident. The Appeal Court was not prepared to interfere with the original decision that there was an insufficiency of evidence to form the basis of a reasonable suspicion of fraud.

## **7. EVIDENCE GATHERING**

- 7.1** The integrity and meaning of most evidence will deteriorate if it is not captured, logged and stored properly. Evidence includes written notes, witness statements, sketches, recordings, photographs and physical evidence left at the scene.
- 7.2** As an insurance litigation lawyer, my recommendations would be for you to record, capture and store the evidence as though there will be a trial. There is no place for a persuasive, meaningful argument at trial unless there is enough evidence upon which to base it.
- 7.3** I also recommend that you make clear notes (bearing in mind that ambiguous information will become even more unclear over time), and follow your

procedures at all times. Your failure to do these things can form the subject of many hours' cross-examination months or years later.

- 7.4** Life goes on after accidents and crimes, and many things will change considerably over time:

- (a) Items will be moved at the accident site or crime scene;
- (b) The memories of the people involved in the incident (emergency services personnel, investigators, witnesses, property owners) will fade;
- (c) Witnesses will move around and some will not be able to be located later on;
- (d) Witnesses may suffer serious injuries or illnesses, some may lose their memories entirely and some may pass away;
- (e) Investigators will attend many other accident sites and crime scenes and memories can become jumbled;
- (f) People who have had involvement in the loss may tailor their explanations to suit their purposes, and falsify evidence; and
- (g) Unclear statements may be construed in a way that does not reflect the writer's intended meaning.

## **8. KEY LESSONS**

- 8.1** In the context of a legal case, burden of proof (also called onus of proof) simply means responsibility to prove the case.
- 8.2** In criminal cases, the prosecution bears the burden of proof to establish the guilt of the accused. In civil cases, the burden of proof rests on the plaintiff. There are some exceptions to these general rules.
- 8.3** The standard of proof required in civil law cases is the balance of probabilities. In criminal cases, the standard of proof the prosecution's case must meet is beyond reasonable doubt.

Evidence is critical to satisfying the burden of proof in any legal case.

## **FIRE RELATED RECALLS**

(Source: [www.recalls.gov.au](http://www.recalls.gov.au))

### Brivis Evaporative Cooler AD Series & Carrier 29CB Series Evaporative Cooler

Product description - The coolers were manufactured and sold in Australia from 28 August 2000 to 21 November 2003. The evaporative coolers consist of cooling pads, and axial fan and motor assembly, a control box, pump and solenoid valve mounted on a metal chassis with a metal enclosure with is mounted on top of a roof. These units use water stored in the base of the unit which is pumped into a distribution system within the unit's roof that directs the water to the cooling pads through which air is drawn and cooled. This air then passes into a system of ducts within the roof space to provide cooling.

Identifying features - Serial numbers 403265-563076.

What are the hazards? - Fire

What are the defects? - The water circulating pump in these units may fail and, in extremely rare cases, property damage and/or personal injury may result.

### Hart International Agencies Pty Ltd—Adventuridge Rechargeable Camping Lantern—Car Charger

Product description - The recall relates to the car charger included with the Adventuridge Rechargeable Camping Lantern. Item 8716. The product was sold only in ALDI Stores from 18 September 2008.

What are the hazards? - Injury.

What are the defects? - Due to a fault in the electronic charging circuit, the internal battery can be overcharged when charged using the car charger. This results in the battery emitting hydrogen gas, which can build up inside the unit, potentially causing it to explode in the presence of an ignition source.

### Hewlett-Packard (HP) and Compaq Notebook Computer Lithium-Ion Battery Packs

Product description - Lithium-Ion rechargeable battery packs used with certain HP and Compaq brand notebook computers. The affected battery packs have a label incorporating a unique, identifiable CT code sequence and are for use in the HP Pavilion: dv2000, dv2500, dv2700, dv6000, dv6500, dv6700, dv9000, dv9500 and dv9700, Compaq Presario: A900, C700, F700, V3000, V3500, V3700, V6000, V6500 and V6700, HP Compaq: 6720s and HP: G6000 and G7000 notebook computers. The affected battery packs were sold in HP notebook PCs and separately as options or spare parts between August 2007 and March 2008.

Identifying features - As above

What are the hazards? - Fire and burn.

What are the defects? - There is a risk that in rare cases these Lithium-Ion batteries can overheat posing a fire and burn hazard to consumers. This issue is unrelated to any previous HP battery pack recalls.

Dates available for sale - June 2007 - August 2007

Ridge Tool Australia—RIDGID 300 Power Drive Threading Machines

Product description - Threading Machines—RIDGID 300 Power Drive, RIDGID 535 M/C, RIDGID 300 & 1233 threading machines.

Identifying features - Machines with serial numbers ending in 0408,0508,0608,0708,0808,0908,1008 or 1108

What are the hazards? - Electric shock and fire.

What are the defects? - Ridge Tool Australia recently determined that the setscrews that retain the brush holders in these motors may not be properly tightened. This could allow the brush holder to back out and the brush lead to contact the motor housing. If a machine in this condition is used with an improperly grounded power supply, this could result in an electrical shock or fire hazard which could cause serious injury or death.

GAF Control Australia Pty Ltd—Sunair Fan Heaters

Product description - Model numbers FHS34 and FHS35. The products were sold nationally at Bunnings, The Good Guys, Mitre 10, Coles, Priceline, Franklins, Kmart, Foodstuffs New Zealand and various independent stores during 2005, 2006 and 2007.

What are the hazards? - Fire.

What are the defects? - The fan heaters have a mechanical fault within the terminal block which in the event of failure could result in a fire.

Carrier Air Conditioning—Conditioner

Product description - Models no 42Y & 42E with electric heating elements. Units are manufactured in Italy and are primarily used in commercial applications such as cooling and heating systems in hotels/motels.

What are the hazards? - Fire

What are the defects? - The problem was caused by an accumulation of negative conditions mainly unsatisfactory maintenance and incorrect installation. These negative conditions may favour an elongation of the heating element that in turn may cause the edge of the heating element pushing to the side of the unit, causing a wire cut. This wire cut may lead to an electric ark, which may lead to a spark which could cause a fire.

Chief Kitchenware Pty Ltd—Mistral, Vogue Design and Plugz Bathroom Heater Exhaust Fan and Light Combinations

Product description - This recall is an expansion of recall number 2007/9660 dated 19/11/2007. Mistral M6600-O. M6601-O. M6700-O. M6700DUCT. M6705-O. M6740-O. M6715 AUTOHEAT. Plugz: P3N1-2. P6601-O. Vogue Design: VD2N1/2. VD3N1/DUCT. RingGrip: 6600-O. 6700-O. 6601-O. Only models with two radiant heat globes are affected. These products were sold nationally between 2000 and 2007 by electrical goods retailers, electrical contractors and national DIY stores.

What are the hazards? - Fire

What are the defects? - There is a risk of the lamp holders overheating and creating a risk of fire.



Hagemeyer Brands Australia Pty Ltd—  
Dimplex Superheater

Product description - Model numbers R0F24TI and R0F24ECC. Affected heaters have a three (3) digit batch number between 000 and 377, which is located on the rating label found on opposite end to the control panel, between the two large wheels. The heaters have been sold nationally by major electrical retailers since March 2006.

What are the hazards? - Fire

What are the defects? - The heater has had reports of a component fault, which can cause overheating near the heater's control panel and, in some cases, risk of fire.

Sales Express Pty Ltd—Modern Living  
Upright Fan Heater

Product description - Model: MLMFH200. Batch codes: JS0608 - JS06015 - JS06016. Approval no. S/10. The product was exclusively sold by TARGET stores throughout Australia from April 2006 to August 2006.

What are the hazards? - Fire

What are the defects? - Under certain operating conditions, when heater is accidentally tipped over and airflow around the heating element is obstructed, the thermal protection may not activate in a timely manner to cut power supply, to safeguard against overheating.

WAECO Pacific Pty Ltd—WAECO &  
Mobicool Portable Absorption Coolers

Product description - Portable absorption cooler, 3-way (gas, 12V DC, 240V AC), 35 litre - 2 models: i) Mobicool A-35-12240PB37 ii) WAECO CA-35-12240PB37

Included: all product sold from Feb 2006 to end of Aug 2008 except the following; - Not included: A-35-12240PB37 sold after May 2008 in serial number ranges: 05001945 to 05002000 06002161 to 06002229

- Quantity affected: A-35 2,088 units CA-35 6,117 units

What are the hazards? - Fire

What are the defects? - At the rear of the cooler is a threaded inlet pipe to which a gas hose and regulator must be fitted for connection to a gas bottle for LP operation. The external thread may not be concentric with the internal sealing surface taper. This could result in a gas leak which may then ignite and cause a fire. If this occurs, and a fire were to be left unattended, the pressure inside the ammonia absorption system could increase to a level whereupon the heat exchanger pipes may burst.

Austwide Wholesalers Pty Ltd—Citronella  
Sticks Garden 64cm w/Bug Design

Product description - The sticks can be identified by the Item Code GA8054 and the Product Bar Code 9316341 433119. The item consists of a candle on a bamboo stick. The candle can be pink, yellow, blue or green and is painted with butterflies or dragonflies. This item was distributed in NSW, QLD, SA, VIC and WA between the 27 August 2008 and 20 November 2008.

What are the hazards? - Fire

What are the defects? - The citronella sticks do not meet safety requirements for candle accessories, as the bamboo may ignite and continue to burn for more than 5 seconds when flame is applied.