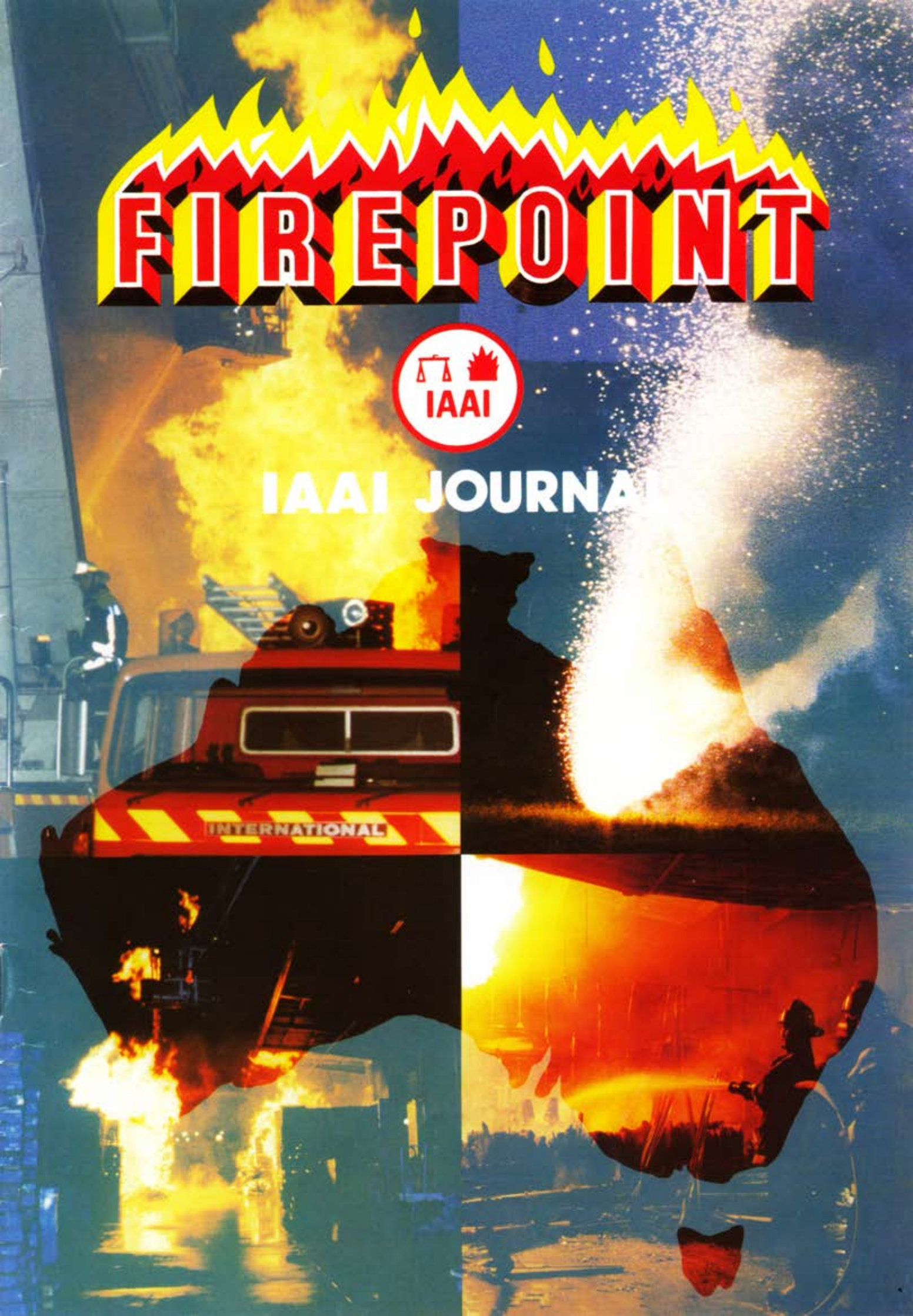
FIREPOINT

IAAI

IAAI JOURNA



June, 2004 Volume 15, No. 2 Issue No. 58

Firepoint

ISSN 1035 2287

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FIREPOINT: INTERNATIONAL WINNER OF THE IAAI 2001/2002 AWARD FOR THE OUTSTANDING PUBLICATION OF A CHAPTER NEWSLETTER OR MAGAZINE.

Reminder: If you have not yet paid your annual membership fee, please do so now

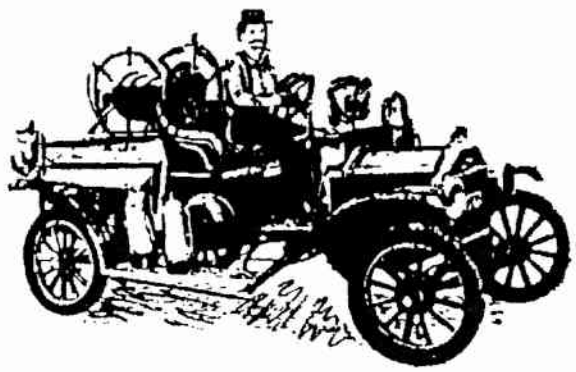
EDITORIAL

We include in this issue another case study, from an investigator well known to this Editor. If you have a case study to submit, preferably about 2 pages long, please contact us, so that we can keep this series rolling.

There is also the first part of a two part lecture on electrical fires, which should be of wide interest and value.

The article on spoliation comes direct from the most recent AGM of our international body, the IAAI.

Wal Stern



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Issue No. 58, ISSN 1035 2287

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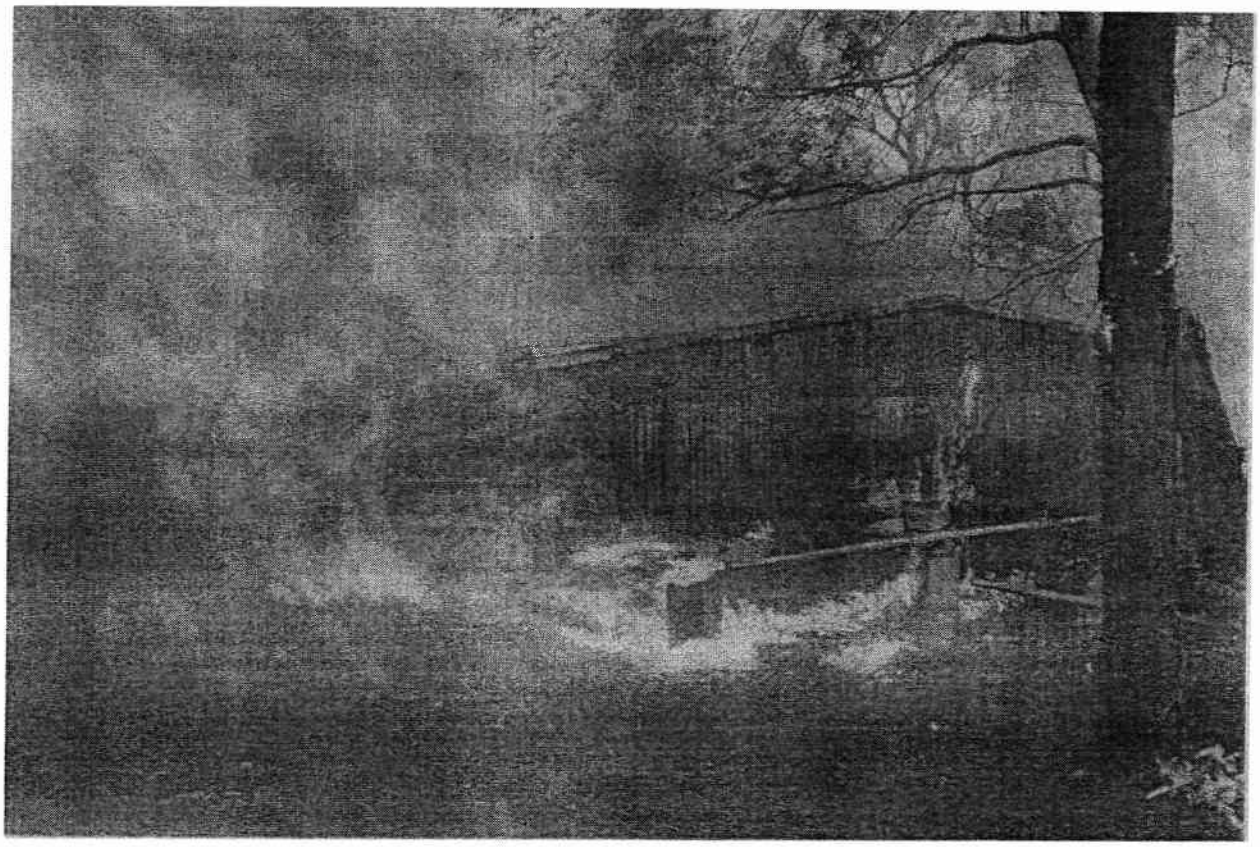
PRESIDENTS REPORT



The NSW Association of Fire Investigators Committee is endeavoring to ensure that all members get as much benefit as possible from their membership. To this end we have put a lot of energy in recent times into our website and its ongoing development for the benefit of all members. At our recent meeting, it was agreed that we should approach all members to obtain feedback / suggestions / inclusions to improve the website. Members are reminded of the address of the site which can be found at www.nswafi.com.au and if you wish to provide feedback or would like something included on the website, please contact the Committee and help us improve its worth.

We are also actively seeking corporate sponsorship to our website and any sponsorship enquiries should be addressed to Committee Members Mitch Parish or Roger Bucholtz or lodge an expression of interest via the website.

Finally, due to circumstances beyond the control of the Committee, the proposed Field Day and AGM in Canberra has had to be cancelled at this time. However we are now planning an information evening and dinner in August to be combined with our Annual General Meeting.

Keep an eye on the website for further details.
Yours Sincerely,
Richard Woods (President)

NSW Association of
Fire Investigators inc.

AFI
IAAI Chapter # 47

Education Night

"Fatal Fire Investigation"

From Fire Scene to Post Mortem

Members of the Fire Services, Police, ANZ Forensic Science Society, Royal College of Pathologists (Aust.) and other interested guests welcome to attend – no cost! You are invited to a free educational evening involving a lecture and discussion, for members and guests. **Please book to ensure a seat **

Speakers – * Dr Peter ELLIS – Director Dept. Forensic Medicine – ICPMR – Westmead
*** Inspector Ross BROGAN – NSW Fire Brigades**

Venue : Ryde Eastwood Leagues Club – Ryedale Rd. West Ryde
Time : Thursday 1st July 2004 – 6.30 pm
(refreshments)

The speakers will involve you in fatal fire investigations, showing the methodologies used at the fire scene investigation through the eyes of the practitioners, and lead you into the world of the Pathologist at the Post Mortem.

**** Contact Secretary Norm Hewins – firefly_511@bigpond.com or 0418654584 to ensure seating and refreshments**

"Providing Fire Investigation Education....the Path to Prevention"

ELECTRICAL FIRES

This is the first section of a talk given on 1 April 2004 by John Gardiner to the NSW AFI. John is an electrical engineer, who has been involved for some years with the electrical aspects of fire investigation. The second, concluding section will be included in the next issue of "Firepoint".

1.0 INTRODUCTION

Electricity is a form of energy which is converted to other forms of energy when it is used to perform a task, and when this conversion occurs heat is always produced to a greater or lesser degree. There is also some heat produced in the wiring connected to the electrical device.

For example electrical energy is converted to:-

- light energy (electric lamp) plus heat
- mechanical energy (electric motor) plus heat
- heat or thermal energy (electric heater) plus infra red radiation

A convenient measurement of the heat produced by electric current flow is Watts.

If a fault develops, the current (and heat energy) can increase to the extent that either the appliance burns out, the connecting wiring overheats and melts the plastic insulation or the plug and socket may burn out.

An electrical fire can then occur where the overheated wiring, motor, plug etc are in contact with, or close to flammable or combustible material.

2.0 ELECTRICAL CAUSE OF FIRE

An electrical fire can be defined as a fire where an electric current or electrical fault is found to have been the ignition source. Some examples would be:-

a) Lightning strike -Where extremely high voltages and currents, for a few thousandths of a second, produce so much heat that surrounding materials catch fire and continue to burn.

b) Overloaded wiring - Where the electric current flowing in the wires exceeds the rating of the cables. The wiring heats up and melts the insulation and can set fire to flammable material nearby. Commonly found in flexible cords, or power board leads.

c) Loose wiring connections - The current flowing through the wiring encounters resistance at the connection and generates heat. This can start a fire in the wall at the back of a power point, in a wiring junction box in the ceiling, above light fittings or inside a switchboard.

d) Electrical "arcing" (or sparking) - Where wiring insulation has been damaged by an external occurrence, and which lets the copper conductors inside a cable just touch one another, or to just make contact with the metal case of an appliance.
A small current will then flow from the "live" conductor to the neutral or earth wire, or, to the earthed metal case.

The current will initially be too small to blow a fuse or to trip a circuit breaker, but because the contact area is also very small (a few strands of wire) the heat produced at this point can reach sufficiently high temperatures to melt or vapourise metals such as copper, brass or sheet metal.

The localised heating will ignite combustible materials in close proximity and start a fire.

Arc welding is an example of "controlled" arcing, an arcing fault is "uncontrolled".

NOTE 1:- CABLE INSULATION CAN BE DAMAGED IN A FIRE, AND, IF THE POWER IS ON, ARCING MAY ALSO OCCUR. THEREFORE SIGNS OF ARC DAMAGE ON WIRING DOES NOT NECESSARILY MEAN THAT THE FIRE WAS CAUSED BY AN ELECTRICAL FAULT.

NOTE 2:- FIRES CAUSED BY LOOSE WIRING CONNECTIONS, OR, INSULATION DAMAGE, COMMONLY OCCUR IN MOTOR VEHICLES WHERE THE POWER SOURCE IS A 12 VOLT BATTERY. THEREFORE ELECTRICAL FIRES CAN START IN LOW VOLTAGE OR HIGH VOLTAGE WIRING SYSTEMS.

NOTE 3:- BUILDING FIRES GENERALLY ARE NEVER HOT ENOUGH TO SIGNIFICANTLY DAMAGE METALS SUCH AS COPPER, BRASS OR STEEL. IF EROSION OR SIGNS OF LOCALISED MELTING OF BRASS TERMINALS OR CONNECTORS IS FOUND IN THE AREA OF FIRE ORIGIN, IT USUALLY INDICATES THAT THIS HAS BEEN A "HOT CONNECTION" OR HIGH RESISTANCE POINT AND COULD HAVE CAUSED THE FIRE.

e) Appliance Fire - Electrical faults inside appliances are a common cause of electrical fires. The standby power switch and high tension circuits in television sets are mostly to blame. Damaged power leads and moisture in compressor relays or thermostats also cause fires in refrigerators.

NOTE 4:- APPLIANCES WITH PLASTIC CASES ALSO BURN VERY BADLY WHEN EXPOSED TO FIRES, AND OFTEN THERE IS NOTHING MUCH LEFT TO CONFIRM IF THE FIRE STARTED INSIDE OR OUTSIDE THEM. THEREFORE MAKE SURE THE APPLIANCE WAS PLUGGED IN AT THE TIME OF THE FIRE, AND, THAT IT WAS IN THE AREA OF FIRE ORIGIN BEFORE CONCLUDING THAT A FAULTY APPLIANCE CAUSED THE FIRE.

3.0 ELECTRICALLY RELATED FIRES

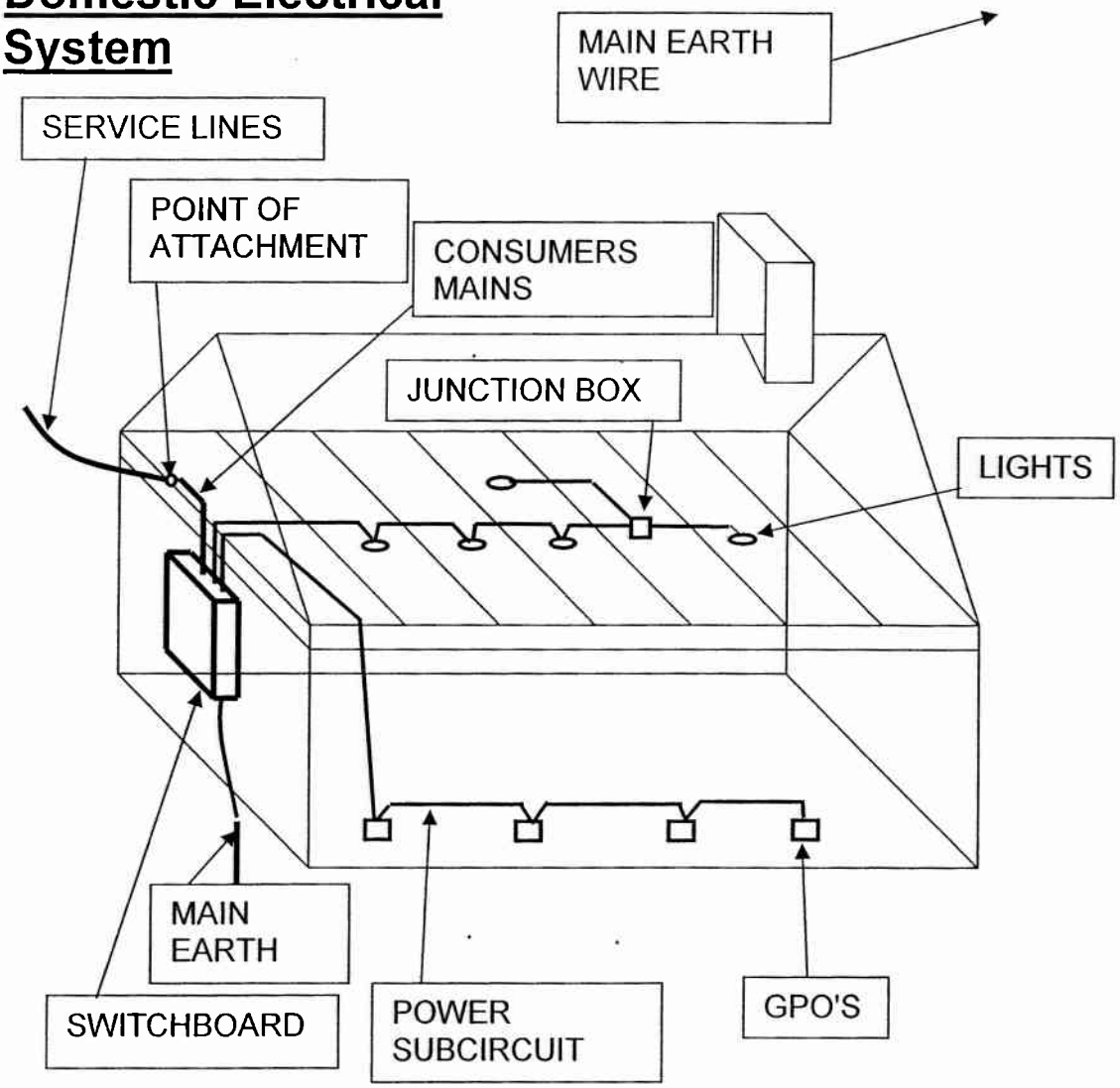
Fires can also be caused where there is no electrical fault, but there has been inappropriate use or faulty installation of electrical appliances or components. Some examples of these would be:-

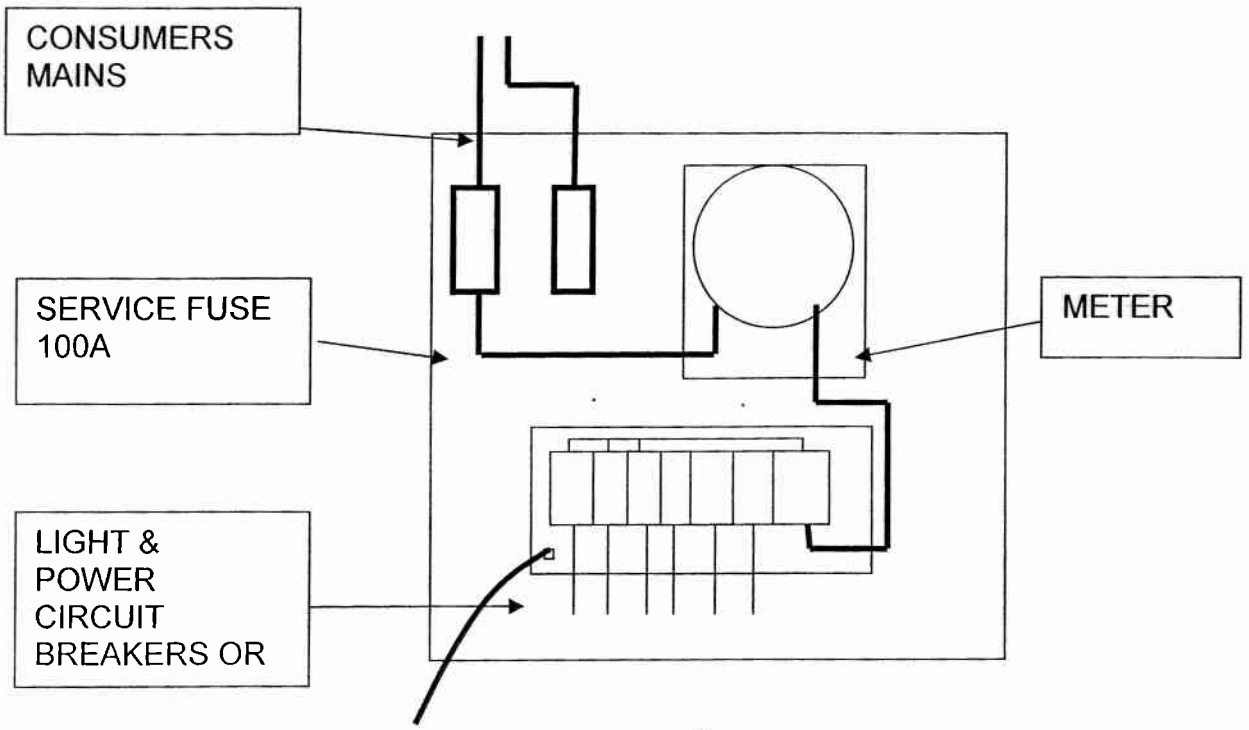
- Insufficient ventilation around recessed lights in the ceiling, which can set fire to debris, timber or insulation material.

- A clothes dryer with blocked lint filter can catch fire or set fire to clothes inside the drum.

- Heater being placed too close to clothes or furnishings.

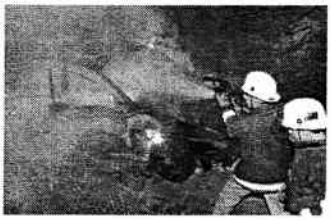
Typical Domestic Electrical System





Welcome

Since our last report in Firepoint, the Queensland Chapter has held their Annual General Meeting, confirmed the annual association sponsor and released the 2004 Conference registration brochure. Reports on these issues follows -



Conference 2004

The 2004 QAFI Conference registration brochure "Motor Vehicle & Machinery Fire Investigation – The Moving Scene" has now been released and registrations are starting to flow in.

Conference sponsors are Deacons, Freemans, GAB Robins and IAG.

Discount registration fees have been offered for all QAFI, AFI (NSW), VIC AFI and IAAI members in Australia & New Zealand along with early booking discounts and group discounts.

A brief overview of the program & registration costs is enclosed with this edition of Firepoint.

Please note that delegate numbers will be restricted to 100 due to safety requirements on day 2 of the program.

All conference registration enquiries should be directed to Julianne Foley, QAFI Secretariat (07) 3822 4700 or e-mail admin_officer@qafi.asn.au

All other enquiries should be directed to Gary Nash, Chairman 2004 Conference Committee.

gary@forensicservices.com.au

Annual General Meeting

The Queensland Chapter's "Annual General Meeting" for the year ended 31st December 2003 was held on the 19th March 2004.

The following members were successfully elected into their respective positions on the 2004 QAFI Executive Committee –

President-	Gary Nash Forensic Services Australia (Qld) P/L
1st VP-	Michael Holohan Quinlan Miller & Treston
2nd VP-	Aldo Pirlo Wyatt Gallagher Bassett
Secretary-	Brian Richardson DIR – Electrical Safety Office
Treasurer-	Ashley Jones Deacons Lawyers

Committee

- Kate Ridgway (Imm. Past President), Tresscox Lawyers
- Robert (Bob) Campbell, Queensland Police Service
- Edward (Ted) Beitz, Q.F.R.S.
- Rowley Ahern, McLarens Young International

On behalf of our members, I wish to thank these dedicated members for their support of our Association and wish them a successful tenure in their elected roles.

The following 2003 committee members retired at the recent AGM –

- Trevor Pohlmann, RACQ
- Adrian Barry, QFRS-FIRU
- Sean Remedios, QPS
- Darryn Morris, QPS

I would like to sincerely thank these members for their service to the Queensland Chapter.

Membership

Applications – The following applications for membership have been –

Approved -

- Dean Webb, NSW Fire Brigades
- Ashley Jones, Deacons

Pending approval –

- Noel Leigh, BKI Investigations

Un-financial Members – A number of members have not renewed their membership for the period 1 January through to 31 December 2004. Final reminder invoices have now been issued. If you are unsure of your membership status, please contact Julianne on (07) 3822 4700 or e-mail admin_officer@qafi.asn.au

Not sure if you have advised your current e-mail address? Send a quick e-mail to Julianne anyway. admin_officer@qafi.asn.au

Incoming President's Address

Gary Nash, Forensic Services Australia (QLD) P/L

Thank you for the opportunity to serve you as President of the QAFI for the 2004-05 term.

I would like to thank the 03-04 committee for their efforts throughout the past year, particularly those who are leaving the committee. I would like to welcome new and existing members to the incoming committee and thank them in advance for their active participation in managing the association and co-ordinating functions for the benefit of members.

The 2004 calendar is currently dominated by the major project in July, however other functions will also be run. Planning for the motor vehicle & machinery conference is well underway, thanks to the overall efforts of the sub-committee, but particularly the efforts of Kate Ridgway and Michael Holohan. Our current focus is to continue with the organization of the conference, to ensure that it is as successful as previous conferences. I would like to take this opportunity to encourage members outside of the committee to come forward with assistance for the upcoming conference or with any other suggestions in relation to the QAFI's operation.

I would like to thank Kate for her commitment to the QAFI over the past few years and for her outstanding ability to lead and coordinate as Chapter President. I am grateful for her continuing presence on the committee and major project committee and hope I can adequately follow in her footsteps. I also wish to thank O'Shea Corser & Wadley, now Tresscox Lawyers for the provision of not only the meeting venue and refreshments, but also Kate's valuable time. Their contribution is truly appreciated.

Finally, a special thank you to Julianne Foley, her efforts and personal sacrifices over the years have been a significant contributor to the current and historical success of the association. I don't know where we would be without her, so I hope she will continue to be an integral part of this association long into the future.

Thank you,

Gary Nash

Association Sponsor

On behalf of the QAFI Executive committee and members, I sincerely wish to thank **Deacons (Lawyers)** for continuing to support the association by way of sponsorship. Deacons will be the "Major Sponsor" of the Chapter in 2004.

Diary Dates

16th & 17th July 2004

2004 QAFI Conference / Major Project

The conference theme for the 2004 Conference / Major Project will be "Commercial Motor & Machinery Fire Investigation".

Conference registration brochure out now. Contact Julianne on 3822 4700 or email admin_officer@qafi.asn.au

VICTORIAN NEWS

Training Sessions

Planning of training sessions has been a high priority for the committee and below are the next set of training sessions. Bookings through the relevant contacts are essential to ensure venues and catering are available.

"Investigation Law"

To be held at the Forensic Science Centre, Forensic Drive, McLeod Mel 19 J8, on Friday 18th June 2004 at 1330hrs. Session to include discussions on exhibits, privacy legislation, interviews, FOI requests, court system and more.

OH&S Seminar

Venue to be advised, Full day Saturday 14th August 2004. OH&S issues for all on fire scenes including hazardous materials, protective clothing, safety equipment, risk assessment and more. State Coroner will be in attendance.

Anyone interested in sponsorship of the seminar please contact Noel DeSair on email desair@netspace.net.au .

Annual General Meeting

It is proposed that the AGM will be held at the end of August 2004 and will be held at the Bell's Hotel in South Melbourne. Those interested in joining the committee are to contact any of the committee and nomination forms will be forwarded. This year the positions for election are Vice President, Treasurer, and four committee members.

Currently the committee has a vacancy on the committee which will be filled at the AGM. All voting members must be financial at the time of the AGM.

Membership

Membership fees for the period 2004/2005 will be unchanged remaining at $30.00 per member. Member accounts will be forwarded shortly and prompt payment is requested. Membership fees are due from 1st July each year.

The committee welcomes new member in Mark Collins.

Donation

The committee approved a donation of $250.00 to the Child Protection Society for the Burns Unit which has been an ongoing commitment for Chapter.

Website

Some may have noticed our website disappeared for a period of time but is now up and running again thanks to the efforts of Trevor Pillinger who has located and negotiated a deal with a new service provider.
Trevor is requesting any articles of interest or contributions to the website to be forwarded to his email address tpillinger@investigatortraining.org

SPOLIATION:

ISSUES FOR THE INSURANCE INDUSTRY

An abridged version of a paper presented by Michael J. Pavlisin and Sheila K. Horan to the 55th Annual conference of the IAAI on April 20, 2004.

WHAT IS SPOLIATION?

Spoilation has been defined as the destruction or alteration of evidence.

WHAT IMPACT ON INSURANCE INDUSTRY?

In order to deter spoliation, courts have fashioned sanctions to be imposed upon the spoliating party. These sanctions range from jury instructions which call for an inference that the spoliated evidence would have been damaging to the spoliating party, to completely barring any testimony by the spoliating party's experts, effectively resulting in an adverse finding against that party.

A court decision in Illinois considered the appropriateness of sanctions barring the testimony of a subrogation plaintiff insurer's expert, where the insurer allowed an automobile to be destroyed before the opposing party had an opportunity to examine it.

In imposing the sanctions, the court held that the plaintiff, as an insurance company, "unquestionably knew the importance of the car to any products liability claims to allow potential defendants to prepare a defense. Even though the insurer saved suspect wires from the car, and photographed it, the court held that the insurer should have preserved the entire car to allow the opposing party to inspect it.

HOW MAY A DUTY ARISE?

The starting point for any spoliation claim is determining whether a party has a duty to preserve evidence. This duty can be imposed by statute, such as civil procedure sanctions for failure to comply with discovery, civil and criminal statutes prohibiting destruction of evidence, and rules of professional conduct governing attorneys. It can also be imposed by pre-existing contract, by an agreement between the parties after the loss to preserve the evidence, by court (protective) order after the loss, and/or by voluntarily assuming the duty to preserve the evidence.

A duty to preserve evidence may also arise where there exists a potential for litigation and the party knew or reasonably should have known of that potential. This means that if it is foreseeable that evidence could be needed for a trial or a claim, then parties have a duty to preserve the evidence.

Courts in Alabama, Illinois and Massachusetts have held that a duty to preserve evidence attaches at the point that an expert first begins an investigation, if

there is a potential for litigation. Some states, such as Illinois, have also held that a party will not be divested of its duty to preserve evidence simply by transferring the subject product or property to another, such as the party's attorney.

A duty to preserve evidence may also be inferred through recommended practice. For example, the NFPA 921 Committee has recommendations for preservation of evidence in connection with the fire scene for investigation.

Another such example is the National Institute of Justice/Office of Science and Technology and the National Center for Forensic Science which have begun a joint initiative to create National Guidelines for collecting and preserving evidence. The purpose of the Guidelines is to establish a standardized approach to collecting and preserving evidence in the area of arson and other crime scenes. It is therefore important to be aware of recommended guidelines or practices which may be used to create at least an inference of a duty to preserve evidence.

WHAT MUST BE PRESERVED?

Several state court decisions have held that spoliation occurred when "crucial" evidence was destroyed or altered. Examples of crucial evidence include a heater that exploded, a furnace that malfunctioned, a car that caught on fire, or a crimping machine alleged to have caused an injury.

In determining whether crucial evidence has been destroyed, an Alabama decision held that where a party saved a component part of a gas system, but failed to preserve the entire system, evidence was spoliated. The reasoning under these holdings is that if a product is the focus of an investigation, the entire product is crucial evidence.

HOW MUST EVIDENCE BE PRESERVED?

In order to allow both parties equal opportunity for inspection, courts in Illinois and Massachusetts have required that an expert may not deliberately or negligently put himself in the position of being the only expert with first-hand knowledge of the evidence in dispute.

In a Massachusetts case, the plaintiff's expert was in possession of the seat belt at issue, and pursuant to his examination, performed destructive testing. The defendant asserted that plaintiff's testing of the seat belt so altered it, that the defendant's expert was effectively precluded from making any useful examination.

The court barred the plaintiff's expert testimony at trial, holding that to allow the expert to testify would allow the expert to substitute his own opinion or description in place of the actual evidence.

An Illinois court decision concluded that even though the insurer inadvertently misplaced component parts of the product at issue, the effect upon the defendant was to deny them any opportunity to establish alternative cause of the fire, and therefore it was proper to bar the insurer's expert testimony.

One Ohio court decision suggested that to avoid spoliation claims, parties should agree to mutual inspections with both

parties present for any testing or manipulation of the evidence.

In California, the court suggested that the party holding the evidence should contact the opposing party and impose a deadline for inspection, beyond which the opposing party would have to bear the cost of preserving the evidence.

LIMITS ON THE DUTY TO PRESERVE?

Certain court decisions find that although the duty to preserve crucial evidence is expansive, it is not unlimited. The California and Illinois courts have found limitations on liability for spoliation by stating that parties are required to act "reasonably" in preserving evidence.

In an Illinois decision, the court held that where there was no showing of bad faith by a party in discarding component parts of an allegedly defective propane cylinder, evidence was not spoliated. The court found that discarding the component parts was a reasonable action because at the time the parts were destroyed, all the experts in the case had agreed that the destroyed parts were not the cause of the fire. The court concluded that a party "cannot be held to take extraordinary measures to preserve items which were not relevant to either of the parties at the time they were destroyed.".

Some courts have held that while a party does not have a duty to preserve evidence indefinitely, a party must hold it for a "reasonable" length of time. A court decision in Idaho held that where a party afforded the plaintiff an opportunity to examine the evidence, and after one year the plaintiff had not examined the evidence, it was reasonable for the party to notify plaintiff that the evidence would be destroyed absent a timely response.

WHEN CAN SUIT FOR SPOLIATION BE BROUGHT?

Certain states hold that unless the underlying cause of action is terminated, any action for spoliation is premature, because actual injury cannot be sufficiently alleged until the party has suffered an actual loss in order to assess damages. Courts in Alaska, Florida, and Illinois have held that a party need not necessarily first pursue the underlying claim before bringing a spoliation action.

Those courts held that the cause of action for spoliation may be brought with the underlying suit in order to allow the jury to hear common issues on causation and damages concurrently. In a recent Illinois Supreme Court civil action, concurrent litigation of the spoliation claim was allowed, but the court specifically required that sufficient facts be alleged to show the loss or destruction of the evidence would create the inability to prove the underlying lawsuit.

The California Supreme Court overruled a much-cited 1984 Appellate Court decision, Smith v. Superior Court of California, in which the Appellate Court recognized an independent cause of action for intentional first-party spoliation of evidence. The issue before the California Supreme Court was whether a party, who

learns of spoliation during a lawsuit, may bring an independent cause of action for spoliation. The Court held that in such a situation, there is no need for an independent cause of action because the trial judge can impose sanctions, or give an adverse inference jury instruction to remedy the spoliation.

BEWARE OF VARIABILITY IN APPLICATION OF SANCTIONS !

In weighing whether to impose discovery sanctions, the Illinois courts generally consider whether spoliation of evidence deprived an opportunity to determine alternative causes or defenses, resulting in substantial prejudice. Illinois courts seem to focus less on the conduct which caused the spoliation, and more on the effect the spoliation had on the case. The reasoning is that if a party is rendered unable to establish a defense or cause of action because of spoliation, it is immaterial whether the acts were intentional or negligent.

Consider however, a recent Illinois Second District case, which predated the Illinois Supreme Court decision confirming the negligence standard for spoliation.

The Appellate Court considered the spoliator's good faith and reversed a trial court's imposition of sanctions for spoliation. The court considered the damage done to defendant's case as a result of not having access to the spoliated evidence, and additionally considered the intent of the party that spoliated the evidence.

While finding there was no showing that the spoliator had not acted in good faith, the court further found no substantial harm to defendant's case, since experts for each party agreed that testing of acetylene torch hose was unnecessary.

A subsequent case from the Illinois First District (Second Division) explicitly rejected the idea that a court should consider the intent of the spoliating party, stating that the Second District "appears to have used the plaintiff's good faith as a gauge for measuring prejudice to the defendant." The First District further held that in determining the appropriateness of discovery sanctions, a court should consider whether a party's case was substantially harmed by not having access to the spoliated evidence. In this case, the defendants' experts had not yet tested or examined evidence involved in an explosion when plaintiff allowed that evidence to be destroyed. The warehouse storage facility inadvertently disposed of the artifacts. The court held that it was appropriate to dismiss plaintiff's case because defendant was denied any chance of developing a defense.

In another almost concurrent Illinois First District (First Division) decision, the court held that dismissal of the case was not appropriate, even though plaintiff had performed destructive testing on an auto steering column gear before defendant had a chance to examine it.[45] The court held that even though defendant was denied an opportunity to examine the steering gear in its post-accident condition, the court would not presume from the trial court record that the spoliation necessarily harmed defendant's case

to an extent would warrant dismissal of the suit against it.

Rather, the Appellate Court remanded back to the trial court for a hearing on this issue. On appeal, the Illinois Supreme Court recently affirmed the Appellate Court's conclusion that a potential litigant does have a pre-suit duty to preserve relevant evidence, and additionally affirmed the Appellate Court's holding that an evidentiary hearing weighing the prejudice suffered by the non-spoliating party must be conducted before imposing sanctions.

The Court went on to delineate the six factors a trial court should use in determining what sanction, if any, should be applied in the case of spoliation. Those factors are: (1) the surprise the spoliation presents to the adverse party; (2) the prejudicial effect of the spoliator's proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objections to the testimony or evidence; and, (6) the good faith of the party offering the testimony or evidence.

Contrast the above First District Appellate decision with a Fifth District Appellate decision issued about five months earlier, also in which auto steering column evidence was destroyed. The court here found spoliation to exist. It should be noted that the court focused on the fact that the defendant spoliator had previously been served with a notice to preserve evidence by the plaintiff. There was no analysis as to whether there was a showing of prejudice to plaintiff's case. Rather, there was simply a deference to the trial judge in determining sanctions.

Caution should be used when navigating from jurisdiction to jurisdiction in defining sanctionable conduct, since trial and appellate courts can be unpredictable in their rulings. Being proactive and consistent in preserving evidence is recommended.

DOES FEDERAL OR STATE LAW APPLY?

The United States Court of Appeals, Third Circuit, suggested that while the federal courts have the inherent power to preclude evidence for spoliation, it is not clear whether the federal courts should apply state substantive law or federal evidentiary law when imposing sanctions for destruction of evidence in spoliation cases.

In a recent Seventh Circuit case out of Illinois, the court upheld the dismissal of the insurer's subrogation claim. In doing so, it held that state law governs issues that have a potential to alter the outcome of a case.

The court determined that under Illinois law, a party has a pre-suit duty to preserve evidence it reasonably should have known would be relevant to the opposing party in preparing a defense. In this case, the insurer failed to preserve all component parts after examining an allegedly defective grill. The court held that at the time the insurer destroyed the component parts, the cause of the grill malfunction had not been determined, and their actions effectively precluded the other party from discovering alternative causes of the malfunction.

In applying sanctions for spoliation, the Ninth Circuit required a showing that the evidence was spoliated in bad faith before the trier of fact may draw an adverse inference. The court seemed to apply federal rather than state law. In this case, after the plaintiff's expert disassembled a lighter at issue in a products liability claim, the defendant argued that the evidence was spoliated. The court held that while the plaintiff's expert had not been as careful as he should have been, absent a showing of bad faith by the expert, the spoliation claim was meritless, and therefore no adverse inference was warranted.

CONCLUSIONS

1. Retain legal counsel to evaluate the state (or applicable federal) law before losses occur, if possible. In any event, retain counsel immediately after notice of loss to assist in evaluating spoliation (and other) issues.

2. Determine the specific basis of any restriction on spoliation with respect to each loss as soon as possible. That is, search for any basis in pre-existing contract or statutory or case law that might be binding on the parties. Make sure your fire investigators are up to date on current recommended practices for fire investigation. Check court records after the loss for protective orders. Fully understand your rights/potential duties before entering into any agreement with other parties, or approving the language of a protective order. Make sure protective order or other agreement language is as unambiguous as possible and understood by all of the parties and their entire investigative teams.

3. Preserve and carefully document chain of custody of evidence with photographs, videotapes, affidavits and/or written agreements. Ensure that storage of the evidence is not subject to potentially spoliating influences. Identify and specify persons with keys to storage facilities and evaluate the facility in terms of security.

4. Work out written agreements with all potentially interested parties (to any extent possible) concerning inspection and/or destruction of evidence. Try to do this immediately after notice of loss, but in any event before debris removal if at all possible. Develop and agree to a written protocol for any "destructive testing" of the evidence, including a definition of destruction testing. Strive to make the definition and protocol as unambiguous as possible.

5. Give all potentially interested parties to the loss reasonable written notice (consider by certified mail) of destructive testing, or any other significant action with respect to the evidence. Give reasonable time to respond.

6. If your state allows for destruction of the evidence after some "reasonable time," try to do so by agreement, and in any event, give reasonable written notice to all potentially interested parties beforehand.

A WOOLSHED FIRE

A Case Study, by Wal Stern.

One Thursday morning, farm workers on a property near Walgett, in north-western New South Wales saw smoke billowing upwards in the distance. Driving to the site, they found their somewhat isolated woolshed to be fully ablaze.

No firefighting was attempted, and when the scene was investigated the following day, the building was almost completely burnt. It had a wooden frame, a wooden floor, and corrugated metal walls and roof. The building was still smoking that day, and the timber almost all consumed.

The previous week, the building had been used for shearing. The shearers completed their work by Tuesday. They turned off the electricity, locked up, and set off to their next job. The fire was noted two days later.

There was no evidence of any strangers being around after Tuesday, or any evidence that vehicles had driven there. There was no evidence of vandalism, or any known reason why a fire may have occurred.

There was no electricity turned on. There was no evidence of any machinery left on, or ignitable liquids being present, or cylinders of gas noted, or materials noted present which might spontaneously combust.

A fire can occur if there is present a fuel (something to burn), oxygen, and an ignition source (a supply of heat or energy). In this instance there was present a timber structure, the woolshed, with dry timber, soaked over time with wool fat. A fire waiting to happen.

There was no shortage of oxygen (in the air). That leaves an ignition source. How did it light up?

I noticed that several timber pens near the woolshed, up to several hundred metres from the shed had been burnt, or were burning. They were all down wind from the woolshed.

I was told they had caught fire, after the farmworkers had arrived. Obviously, the fire had spread from the woolshed to these structures. There was quite a strong wind blowing in the direction from the woolshed to these timber pens, and the burning, flying embers would have been the ignition source.

When I walked around the woolshed, I noticed to my surprise areas upwind from the woolshed, at ground level, where there were burning embers. The furthest area, about 100 metres upwind from the woolshed, was smoking and exhibited burnt embers over an area of several square metres.

Directly between that area and the woolshed, there were several smaller burnt patches at ground level.

How could a fire be initiated two days after the shearers left? And how come there were burning embers upwind from the woolshed? There were no records indicating a change in wind direction.

An examination of the main burnt patch provided the answer. Boy Scouts know that when leaving a camp site, they need to "Bash, burn, and bury".

That's what you should do with the rubbish.

In this instance the rubbish had been collected at a site 100 metres away from the woolshed, been burnt, but definitely not well buried. Burning embers were either left uncovered, or had been blown uncovered by the wind. The wind had maintained their burning state, and then carried them to the woolshed.

Top Photo: Remains of Woolshed. Bottom Photo: Rubbish Site

Application for Membership

Association of Fire Investigators

(A Chapter of the International Association of Arson Investigators)

I hereby apply for membership of the Association of Fire Investigators in the State of ..... in accordance with its constitution and by-laws, and agree to be bound thereby.

I attach the amount of $..... in payment of annual dues.

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1. Name in Full
2. Address for Mail
3. Position Held (e.g. police or fire brigade officer, lawyer, investigator, assessor)
4. Company/Agency
5. Telephone
6. Mobile
7. Fax No.
8. E-mail Address
9. Signature
10. Name of Member Recommending you
11. Telephone No. of Member
12. Address or E-mail No. of Member
13. Signature of Recommending Member

Give your completed form with your payment to any committee member of the Association, or mail it to the appropriate postal address, as shown on page 3. This page also lists contact names and numbers if you have any inquiries.

JUVENILE FIRESETTING IN THE U.S.A

Youth firesetting and juvenile arson remains one of the most dangerous and costly threats for citizens of the U.S. and their property. Over 50 percent of all fires set are done by children under the age of 18. Of that 50 percent, nearly one-third were under the age of 15, and 5 percent of that total were under the age of 10.

Nationwide, there were 41,900 fires set by children! The latest statistics from the National Fire Protection Association shows that there were 165 civilian deaths and 1,900 civilian injuries caused by fires that were set by children.

Who are these children?

According to studies of firesetting behavior, children who start fires may be children in crisis. These fire acts may be cries for help due to stressful lives, unpleasant experiences or verbal and physical abuse. Can a very young child understand the consequences enough to "intentionally" start a fire? If not, what do we call the fires they start?

A child may initiate a fire without intending harm or intending any legitimate purpose for the fire. Even a child in crisis who starts a fire as a cry for help may not intend the fire to cause harm.
In law, each state has a minimum age below which a child is presumed to be unable to form the intent to harm. In many states, 10 years old is the minimum age for legal responsibility.

Prior to 1999, a fire started by such a child would be appropriately coded as "child playing." However, this term was problematic in that "playing" seemed to convey not so much an absence of conscious or legally defined intent as the presence of a frivolous intention of reckless entertainment.

Attempts to replace the phase "child playing" with "juvenile firesetter or firestarter" or "experimentation" solved the problem of inappropriately ascribing a frivolous intention but left intact, or even strengthened, the connotation that the fire was intended.

How much of this resulted in property loss?

The property damage directly associated with these fires was approximately $272 million dollars.

How many of these fire could have been prevented?

Roughly three out of every four children responsible for fires used either available matches or lighters. Additional fires were also set by experimenting with candles, stoves, fireworks and cigarette.

Keeping these type of items out of reach to children is a start to decreasing the number of fires associated with youth firesetting and juvenile arson.

Educational programs that teach children about the dangers of matches and lighters such as Risk Watch® and Learn Not to Burn® are available for pre-kindergarten and school-age children. Only about 5 percent of the nation's classrooms utilize these programs.

Increased use of effective fire safety educational materials in schools, mass media public awareness and the educating of adults of the dangers of lighters and matches around small children is certainly a positive approach to reducing the number of fires started by children.

("Juvenile Firesetting: The Preventable Arson" was the theme for the U.S. National Arson Awareness Week, held May2-8, 2004)