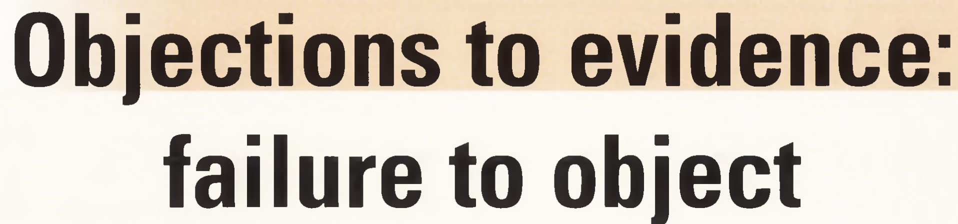

Objections to evidence: failure to object

By Gerard Mullins

Running a civil trial in the 21st century is an expensive and time-consuming exercise. Despite lawyers' best attempts to marshall lay witnesses, documents and expert witnesses in a harmonious fashion, catering adequately for all participants is always difficult. And given the Bench's expectation that the trial will proceed efficiently and within an appropriate timeframe, lawyers tend to focus on getting the evidence taken by the court as expeditiously as possible. The goal is to get the witnesses in to court, through their evidence and back out again.

Consequently, when considering whether to object to evidence that the opposing party has sought to lead, counsel often tries to take a practical and efficient approach. Frequent objections can often draw the ire of the Bench. And although some evidence might be strictly inadmissible, counsel are often prepared to allow the evidence to 'slip through', as it may not have any great impact upon the ultimate outcome of the case. As Kneipp J observed in *Huth v Petersen* [1]

> 'The action of counsel in not taking the objection was merely in conformity with a common and often convenient course, particularly where a jury is not involved, of taking any point as to sufficiency of proof when all the evidence has gone in.'

But failing to object to evidence that is inadmissible is a dangerous practice, as the learned authors of *Cross on Evidence* describe:

'1. If evidence, admitted without objection, is legally admissible in proof of some issue in the case, its evidentiary use should be confined to that purpose...
2. If one party, by its conduct at the trial, has led the other to believe that evidence, though hearsay, may be treated as evidence of the facts stated, and the other in reliance on that belief has refrained from adducing proper evidence, the former party is precluded from objecting to the use of the evidence to prove the facts stated.
3. If evidence, admitted without objection, is "not legally admissible in proof of any issue", it may, once in, be used "as proof to the extent of whatever rational persuasive power it may have"...
4. Where a document is tendered by one party against the other without objection as an admission, the first party and the court are entitled to rely on it against the tendering party to the extent to which it contains self-serving statements, though [the weight of the evidence] is another question.'[2]

These propositions do not generally apply to evidence that is irrelevant or excluded by an absolute rule of law (for example, an unstamped document), but only to evidence in respect of which a party has a privilege, or where a rule of evidence exists that a party can choose to take advantage of, or not.

The basic obligation of counsel to object is summarised as follows:

> 'When inadmissible evidence is tendered, or a question is asked which may elicit inadmissible evidence, it is the duty of counsel who opposes its reception to object at once. Failing to do so may create difficulties on appeal, for it suggests that trial counsel's view, in the light of the issues and the atmosphere at the trial, was that there was no prejudice to a fair trial. The objection should be made with precision, both as to what is objected to and (if the court requires it) what the specific grounds of objection are. The tendering party should be equally specific.'[3]

Ultimately, the decision to object to evidence is a judgement made at the time of the trial. But a careful examination of the ther party's evidence – particularly expert evidence – will often reveal significant aspects of inadmissible evidence. Often the best policy is to object to the evidence, get a ruling and move on. Even if the ruling is against the party, the objection has been made and the position is protected on appeal. ■

Notes: **1** *Huth v Petersen; Ex parte Petersen* [1975] Qd R 340. **2** *Cross on Evidence*, Lexis Nexis, paras 1655-70 (footnotes omitted). **3** *Ibid*, para 1645.

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