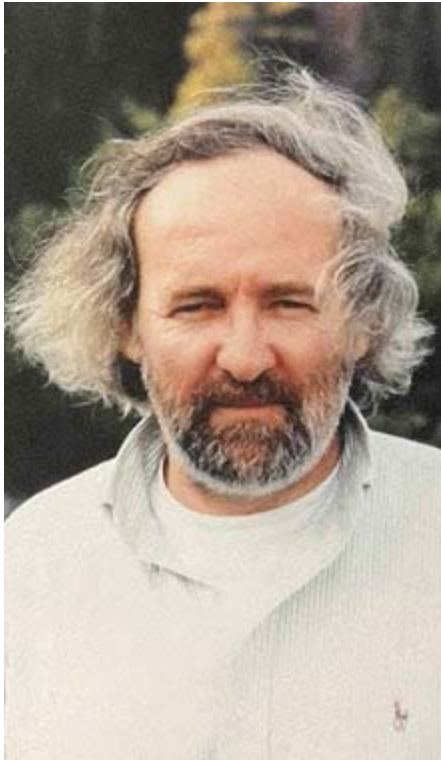


They're all good cases

Paul Byrne SC Memorial Lecture 22 June 2022

By The Hon Justice Peter Hamill



Paul Byrne died on 12 May 2009. He was fifty-eight years old. In the Winter 2009 edition of *Bar News* an obituary authored by Judge Stephen Norrish QC of the NSW District Court described Paul as 'the most outstanding criminal lawyer of his generation'. That was an apt description.

Paul was born in Adelaide on 12 October 1950. His family moved to Sydney about four years later and Paul attended local public schools, and ultimately did his high school at North Sydney Boys High. His family also spent some time living in England. He attended Sydney University where he graduated in 1976 with a Bachelor of Arts and a Bachelor of Laws. By that time, he had worked as a clerk for the Public Solicitor's Office and had come to the attention of the then Senior Public Defender, Howard Purcell QC.

He was called to the Bar in 1979 at the age of twenty-nine and was appointed as a Public Defender.

In 1983, he completed a Master of Laws with first class honours and received the



University Medal. His thesis concerned the dangers of identification evidence, and the ideas that he there canvassed would find critical voice ten years later when the High Court published its judgment in *Dominican v The Queen* (1992) 173 CLR 555; [1992] HCA 13.

He went to the private Bar, starting in Frederick Jordan Chambers, in 1988 where he joined people like Ian Barker QC and Justice Virginia Bell (who went on to do some stuff) as the leaders of the civil liberties and criminal defence part of Frederick Jordan Chambers. That is where I first met him, but he left along with a number of us to found Forbes Chambers, where he remained for something like twenty years. And that's really where I came to know and love him. Right towards the end of his time at the Bar, and his life, he moved to Samuel Griffiths Chambers, where again he was greatly loved.

The title of this lecture, 'They're all good cases', was, perhaps, the most valuable lesson that Paul taught me. There was an occasion when I was in Paul's room having a meltdown about some judge, or some solicitor, or some prosecutor, or some client, or some case I couldn't possibly win. Paul heard me out, as he always did, calmly, but at some point in my diatribe I paused. Paul looked up at me quizzically, spoke kindly and gently, without judgment, and said those magic words: 'they're all good cases.'

And I thought, that is an extraordinarily profound statement. I have never forgotten it. When I'm overrun with judgments, I try

to cling to it. They are *all* good cases.

When Paul said it to me that day it meant so many things. It meant this is how you earn a living. Be grateful for it. And it meant there is always some argument, some point you can make, if you keep working, just do that bit of extra work. And it meant this case is critical to an individual, to your client. But most of all, it meant we are so privileged to do this job, try not to forget it. Our work is so interesting. It may be stressful, but it is never boring. So don't waste your time worrying about it. Have some fun, appreciate how lucky you are and enjoy the privilege of defending people's rights.

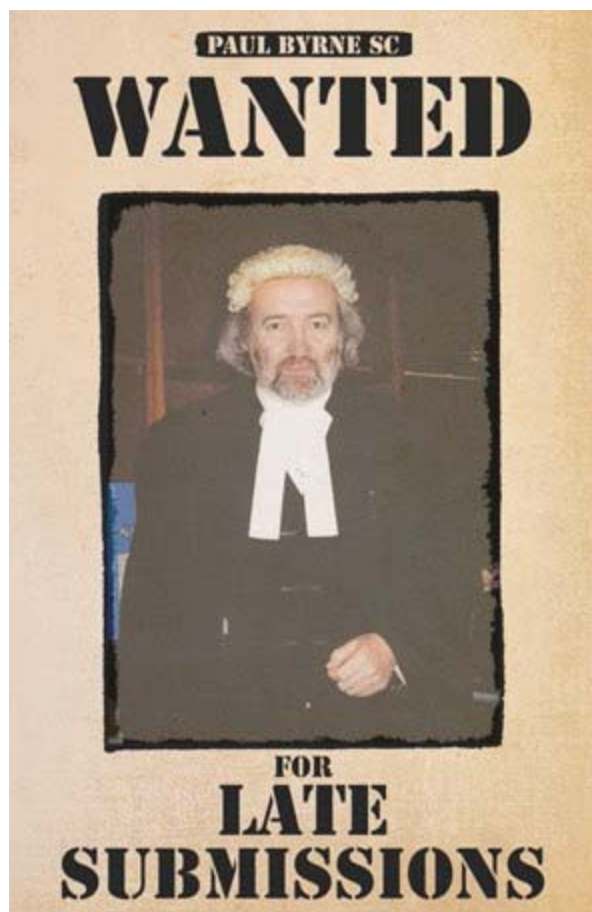
George Patrick O'Neill

So, I'm going to tell a tiny part of the story of the life of a man called George Patrick O'Neill and the part that Paul played in ensuring that he did not spend a moment longer in custody than he should.

Mr O'Neill and his wife were out drinking one night in Wilcannia and they were both real drunk. They got into a row and there was some physical contact between them. Some witnesses said that George threw a punch, others said he pushed his wife away. George said he pushed her away just to get away from her because she was wild. Tragically, his wife fell backwards, struck her head on a garbage bin and she died.

Mr O'Neill was charged with manslaughter by unlawful and dangerous act and was convicted by a jury in Broken Hill. At that time there was a conflict in the authorities around Australia as to what constituted 'a dangerous act' for the purpose of manslaughter. Some cases, or some states, held that all that needed to be proven was that the act carried a risk of 'some harm'. Other states held that it needed to carry with it 'an appreciable risk of serious injury.'

Eric Wilson, then of the Western Aboriginal Legal Service and later a long-time Public Defender, asked for a direction that the prosecution must prove the second, higher test. Over Mr Wilson's protests, the trial judge told the jury that an act was dangerous if it was likely to cause more than trivial or negligible harm. Mr O'Neill



appealed against his conviction, and by that time the issue, or the conflict in authorities, was before the High Court in a case called *Wilson v The Queen* (1992) 174 CLR 313; [1992] HCA 31.

I appeared on George's bail application. I thought we just have to get bail: if the High Court rules for the stronger test, George's conviction has to be quashed. And, as often happened, I was wrong. The Supreme Court judge in the bails court was unimpressed with the conflict in authority, and not impressed by the fact that George would have finished his sentence by the time the High Court decided the *Wilson* appeal, and the application was refused.

I was outraged (I still am). I went back and shouted and screamed through the 'phone to the Western Aboriginal Legal Service who agreed to lodge an appeal against the bail decision. Luckily, I also convinced them to get Paul Byrne to lead me. The problem was there was no power in the *Bail Act 1978* (NSW) for the Court of Criminal Appeal to entertain an appeal from the decision of a Supreme Court judge on a bail application. I just, in my fury, completely misread the Act.

The matter came on before the then Chief Justice of New South Wales, Murray Gleeson, and two other judges. Now, Chief Justice Gleeson was a great judge, and I would say an even more formidable barrister, but he could be very incisive and

I found him just a little bit scary. So, the case started, of course, with the Chief Justice attacking the very process by which we were in the courtroom, suggesting there was no power in the court to even entertain this so-called appeal.

I was panic-stricken, until I saw Paul opening the *Bail Act* at what was then section 30, and read to the court the provision which gave the Court of Criminal Appeal original jurisdiction, not appellate jurisdiction, to hear a bail application where an appeal was pending in the court. While the Chief Justice was catching his breath and looking a little bit admiringly at Paul, Paul turned to section 22(2) of that Act and said, very gently and quietly:

'All applications to a court in relation to bail shall be dealt with as soon as reasonably possible.'

He then said, quietly but assertively:

'We are all here your Honours, and I invite the court to deal with the matter under section 30 and in accordance with the command in section 22(2).'

The court did what it was told, George was released from gaol and the High Court made its decision in *Wilson*, defining a 'dangerous act' as an act carrying with it an appreciable risk of serious injury. George won his appeal in *R v George Patrick O'Neill* (Court of Criminal Appeal

(NSW), 13 August 1992, unrep) and got his re-trial. He was put to trial again in Broken Hill. I was privileged enough to be there when he was found not guilty of the homicide of his beloved wife. It remains one of my most cherished moments of my career. George, who was a huge man, just started sobbing uncontrollably in the Broken Hill dock. It wasn't because he didn't have to go back to gaol – George could've handled that – it was because a jury said he did not unlawfully kill his wife.

So, what do we learn from that? The first thing is don't panic in the face of a hostile reception from the bench. Stay calm. More importantly, always know the source of the court's power and jurisdiction. I suspect Paul knew that I had made the application under the wrong section and just hadn't bothered to mention it. I think he was anticipating the torrid reception that he received. He was ready for it. And, of course, there wasn't the slightest hint that it was me that had made the mistake. There was never a chance that he was going to throw me under the bus that day. It didn't matter who had bugged up the paperwork. All that mattered was that George Patrick O'Neill should get bail. And he did.

The calmness and generosity he exhibited to me that day was one of the many reasons that we all loved Paul Byrne.

Smith v The Queen

Most people know the case of *Smith v The Queen* (2001) 206 CLR 650; [2001] HCA 50, but may not know the way Paul won the case. Mundarra Smith had been subject to identification evidence by police officers, who said that they had looked at the CCTV footage of the bank robber, and they knew Mundarra Smith, and that he was the bank robber. They were expressing that *opinion*. The case had run all the way to the High Court on the question of section 76 of the *Evidence Act 1995* (NSW) and the question of unfair prejudice under section 137. And that's the way that everybody who rocked up that day thought the case was going to go.

But, as we know (let's face it), the majority of the High Court is often much cleverer than anybody else, and they worked out

their own way to an acquittal. They said the evidence wasn't even relevant because the police officers' opinion could not rationally affect a fact in issue, that is, whether Mundarra Smith was the bank robber.

Justice Kirby described what happened when Paul stood up (and I am borrowing his words to some degree). Paul was beset with questions from the court addressed to why the evidence of the police officers was not inadmissible for a completely different reason to anything argued before. Justice Kirby said Paul looked up 'with those thoughtful eyes', trying to work out how he could hold on to Justice Kirby, but also grab the others who were firing these questions at him. In the end, Paul managed to win over all the members of the court. Justice Kirby described it 'as a triumph of differential persuasion'. He said he could still see Paul that day accepting his (that is, Justice Kirby's) analysis on the one hand and then, without a blush, turning to Justice Hayne and accepting his entirely contrary and contradictory analysis. Justice Kirby said that Paul's death deprived the High Court of an advocate who was greatly respected and admired. And he said: 'he was also a lovely man'. And so he was.

Racing cars

If there was one thing Paul knew more about than law, it was racing cars. I think it's fair to say that he was obsessive about racing cars and especially Formula 1.

He had this most wonderful collection of tiny, perfect replicas of racing cars going back decades. He had cars, helmets, paintings, photographs, books, and all sorts of memorabilia that just took over his chambers entirely. He had specially made cylindrical cases in Perspex or glass to display the cars. I used to play a game when I went into his room most times where I would point at a car and ask which car that was, and which race that car had won. He always knew – he always knew the driver, the year, the event, whether it be Le Mans, a

particular Grand Prix, or an Indy Car race. His knowledge was ridiculous, and it was infectious. I'm told by his son Jack that at one stage when Jack started quoting the history of Formula 1 and motor racing with the same anal-retentive precision to someone, Paul just looked up and said, 'he never had a chance.' Paul's son Jack tells me Paul took his wife, Karen, to her first Formula 1 race in the first year of their marriage, and that he went to the Melbourne Grand Prix not very long before he died, when he was unquestionably too sick to go and no doubt had doctor's orders not to go.

One of Paul's first books was the 1958-59 'Automobile Year'. The book fell on hard times over the decades, it was tattered and torn. But it remained treasured and, of course, it was never thrown out. In fairness, nothing much got thrown out. Eventually, Paul had the book leather bound with the dedication from his father still in the front page, which said: 'To Paul on his ninth birthday from Mommy and Dad 12 Oct 1959.'

When Paul was nine and the family was living just south of London, his dad took the family to the 1960 British Grand Prix at Silverstone. That was Paul's first Formula 1 race. Sir Jack Brabham came from behind and battled with Graham Hill, a pom and local favourite, and finally Jack won that battle and took the checkered flag, the first Australian to do so. He went on to win the 1960 World Championship as well. Paul had a black and white photograph of Sir Jack in his room the whole time he was at Forbes Chambers.

Paul had many favourite drivers. Jack says they were all 'passionate, fearless, supremely talented, comfortable in their own skin, but approachable and down-to-earth, no-nonsense racers.' Every one of those things perfectly describes Paul Byrne the man and Paul Byrne the advocate.

So much more than an appellate lawyer

Paul was a great appellate advocate. But Paul was as brilliant in a trial court, or doing a quick plea in the Local Court, as he was in the High Court. There are very few lawyers who achieve this. We know many great appellate advocates, but you wouldn't let them loose in front of a jury. We know great jury advocates, but many couldn't find their way to the Court of Appeal unless given very, very clear directions.





Paul was a persuasive and courageous advocate at every level of the court system. I was fortunate to appear for a co-accused on a number of occasions and learned a lot. He was courteous, always. He was persistent, always. He was prepared beyond belief, always. And he believed in the case. He wasn't one of these defence lawyers who call their clients scum bags or call their case a loser. In fact, he almost never had a bad word to say about anyone. Justice Hamant Dhanji told me that the harshest thing he ever heard Paul say of anyone was: 'I can't cop that bloke.' That was it.



A moment that I cherish concerned an expert witness, a doctor, who gave evidence for the prosecution about an alleged sexual assault. I had cross-examined the doctor at the committal hearing (an historical relic that you can read about in the history books) and I knew he was dangerous and partisan. Paul could feel my anxiety levels rise as the doctor walked to the witness box. The doctor was very dapperly dressed for his big day out and his performance, and he swaggered to

the witness box. My stress levels were high, and Paul just calmly reached across the bar table and gently touched me on the forearm and said very quietly (well, actually not very quietly): 'don't worry son, no jury believes an expert who turns up wearing a bow tie.'

Why we loved him

I think one of the most important things we learn from Paul is not so much how he practised law, but how he lived his life. The racing car drivers that he loved were approachable and down to earth, and so was he. He listened to everybody. There was just no arrogance or ego in him. I mean, there probably was, but you never saw it, it was never on display. He took the view that there was no monopoly on being right, and he certainly didn't have it, so he would listen to the most junior solicitor and assess their thoughts and ideas with exactly the same mind as when he would listen to a former High Court judge or silk.

There is one story that I wanted to share before I stop. You will have to excuse the language. Paul very rarely used



'cuss words', as the Americans would call them. But, we'd had a few drinks one night and I had saved a little bit of money and was in two minds as to how to spend it. I had my eye on a new car – I had never owned a new car – it was a beautiful Peugeot 406 coupe in British racing green with tan leather seats. It was designed by Pininfarina, which I'm told was a good thing. I also had, in the same pool of money, an okay deposit for an investment property. I asked Paul what he thought (because you want to hear the answer you want, you know!). Anyway, we'd had a few drinks and he looked at me real hard and he said: 'people in Sydney are always talking about investment properties. Well, I say, you can't drive around in a fucking investment property.'

It was absolutely terrible financial advice.

But I got the French coupe.

So, let's all have a drink to Paul.

Thank you.

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This article is a heavily edited version of a speech delivered by his Honour Justice Hamill at the Paul Byrne SC Memorial Lecture at the University of Sydney. The full speech along with the case references can be found on the Supreme Court's website, under the tab 'Speeches by current judicial officers'.

