Paul Byrne SC Memorial Lecture: "They're All Good Cases"

The Honourable Justice Peter Hamill

Sydney

22 June 2022[1]

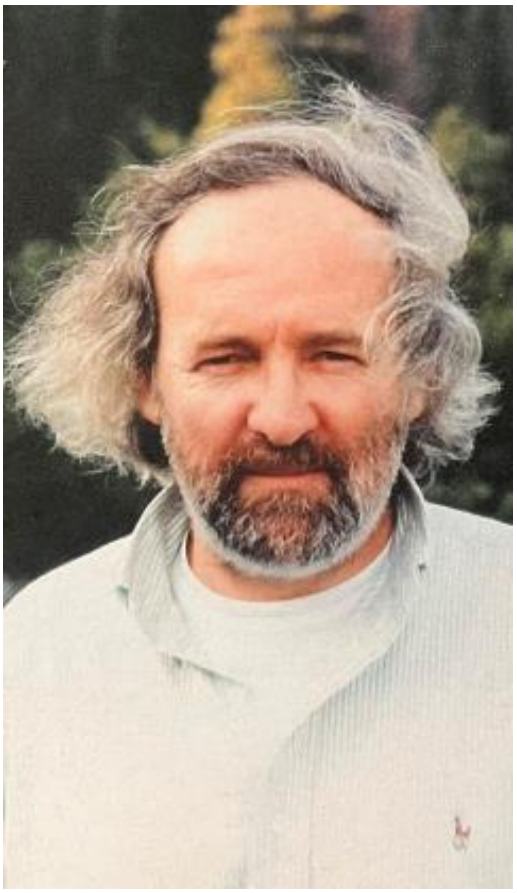

Figure 1. Photograph of Paul Byrne.

Acknowledgment of Country, wrongs and custodianship

Can I first testify to the terrible wrongs that have been perpetrated upon the traditional owners of the land on which we gather? I acknowledge tens of thousands of years of custodianship of this land by the Gadigal people of the Eora nation. I pay tribute to the

[1] This work was first published in *Current Issues in Criminal Justice*, 19 September 2022, available online at: http://www.tandfonline.com/10.1080/10345329.2022.2099640.

elders and leaders of the Gadigal, past, present and future. I acknowledge the extraordinary resilience and good humour of the people.

As Teela Reid said in her acknowledgment of country at the swearing in of our new Chief Justice, Andrew Bell:

> I acknowledge this Country. I acknowledge that it always was, and always will be, Gadigal Land. Their sovereignty was never ceded and coexists with the sovereignty of the Crown.[2]

Ms Reid tells me the University of Sydney, near what is now known as Victoria Park, was a significant meeting site for First Nations people. The name Gadigal is taken from the Gadi Tree fern, which is significant to this area and its waterways and is symbolised in the new Cadi Garden here at the Sydney Law School. A student of this university, A Cochien,[3] wrote that the Quadrangle sits atop a sacred site. He wrote that Wiradjuri man Dennis Foley was told by his grandmother that the Great Hall and the Macleay Museum stand on what is part of a Gadigal cemetery. His Nan wondered if that is why it is so cold there. Dr Wendy Brady,[4] writing in the University's student magazine at the time, said that the whole of Victoria Park was a corroboree ground. Professor Bill Gammage[5] said the area around Sydney University was called the kangaroo ground. It was almost certainly a gathering place with fertile soil where yams and yam daises were, essentially, cultivated, as were most riverbanks around Sydney.

This is history we are not taught. We are, hopefully, on the cusp of some change with the possibility that the federal government will seek to implement the Uluru Statement from the Heart. As the Uluru Statement says, the First Nations people here are the most

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[2] Supreme Court of NSW, "Swearing-in Ceremony for the Hon. Justice AS Bell as Chief Justice of NSW", 7 March 2022, https://www.youtube.com/watch?v=DVyJyHxPBE4 accessed 22 June 2022.

[3] A. Cochien, "The Constellations Change: Rethinking Cadigal Land and the University of Sydney", *Sydney eScholarship Repository*, 2021, https://ses.library.usyd.edu.au/bitstream/handle/2123/27090/Essay%206%20-%20A.%20Colchien%20-%20culturalnotice.pdf?sequence=2&isAllowed=y accessed 22 June 2022.

[4] Wendy Brady, "Sacred Sites", 1998, https://www.library.sydney.edu.au/about/library-projects/SacredSite.pdf accessed 22 June 2022.

[5] Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (2011, Allen & Unwin).

incarcerated people in the world. We live on land that was taken by conquest, not by settlement. There are hundreds of sites around Australia where horrific massacres took place.

We have to strive to do better. We have to use our positions of privilege to effect change. Paul Byrne was somebody who tried to do that.

I acknowledge again the Gadigal people and their lands.

Paul Byrne SC

Figure 2. Photograph of Paul Byrne, circa 1978.

So, why are we here gathered on their land?

Paul Byrne died on 12 May 2009. He was fifty-eight years old. In the winter 2009 edition of Bar News, the quarterly rag published by the New South Wales Bar Association, there was a fine obituary published by Judge Stephen Norrish QC of the NSW District Court.

Judge Norrish described Paul Byrne as 'the most outstanding criminal lawyer of his generation'.[6] That was an apt description.

Paul, who knew that he was going to die, gave clear instructions that he wanted no fuss and no ceremony. According to his wishes, there was no public funeral and no commemorative service. However, not long afterwards, the Chief Justice of the day of the NSW Supreme Court gave permission to hold a ceremony in the Banco Court on Level 13 of the Law Courts building in Queens Square. Many of us gathered to remember Paul and there were good speeches delivered by his son Jack (who is here tonight) and people like Michael Kirby, former Justice of the High Court, Steve Norrish and Gaby Bashir SC, now the president of the NSW Bar Association.

Later, the idea was hatched to remember Paul in the longer term by this series of lectures that bear his name. The first lecture was delivered by Justice Michael Kirby in 2011. It was entitled 'Homosexual Law Reform in the Commonwealth of Nations: An Impossible Dream?'[7] Since then, several highly distinguished lawyers have spoken here. The list of previous speakers includes four High Court judges, a prominent civil libertarian, Terry O'Gorman and one of our most distinguished criminal lawyers, Phillip Boulten SC.

I am very honoured to follow the most recent speaker, my dear friend and colleague Judge Dina Yehia SC, who spoke in 2019. I was approached to speak the year after Judge Yehia.

[The following (italicised) acknowledgment of the appointment of Justice Yehia to the NSW Supreme Court was not delivered in full due to a delay in the announcement of her Honour's appointment.]

[6] Judge Stephen Norrish, "Paul Byrne SC (1950-2009)", *Bar News – New South Wales Bar Association*, 2009 (Winter), 97.
[7] Michael Kirby, "Homosexual Law Reform in the Commonwealth of Nations: An Impossible Dream?" (2012) 36(2) *Criminal Law Journal* 76, 83.

I will stop for a moment now to pay tribute to the wisdom of our current Chief Justice, Andrew Bell, and the NSW cabinet, on the announcement of the long overdue elevation of Judge Yehia to the Supreme Court of New South Wales.

I am honoured that both Chief Justice Bell and Judge Yehia are here tonight: Dina despite my dreadful neglect in not being able to attend her swearing in on 4 July. I am hoping she will forgive me on the basis that I will be at Fenway Park in Boston cheering on her favourite baseball team.

Judge Yehia's contribution to the law and to the community is extraordinary and includes, most recently, the establishment of the Walama List, a sentencing process for First Nations people. She has also earned the nickname Spicy DCJ for her efficient conduct of super call-overs and the unwieldly list in Court 3.1 at the Downing Centre. Her contributions to the Western Aboriginal Legal Service are legendary west of Bathurst and she was one of the finest Public Defenders of the last twenty years. Anyway, that is probably enough about Dina.

It is an honour to follow her Honour. I also acknowledge many of the distinguished guests here tonight: I thank the Chief Justice and the Chief Judge at Common Law for their attendance—probably just making sure I don't say anything too outlandish. Good luck with that. I also acknowledge the Commonwealth Director of Public Prosecutions, Sarah McNaughton SC. I think she would echo a lot of the things I'm going to say about Paul Byrne and the way he conducted himself in every aspect of his life.

Having been told I was going to follow Dina, I had to think about what I might speak about and realised that it was to be the tenth year of the lecture series. I thought perhaps it would be useful, or nice, to take a break from the worthy and important topics that had been spoken about by previous speakers, and to pause and remember the man himself. And so, I decided that is what I am going to do.

So, I will speak to you tonight about Paul Byrne and his remarkable contributions to the law. I will focus on the lessons to be learned from some of his more important appeal

cases but also, more significantly I think, from his wonderful life, his approach to the practice of the law, his generosity, his courtesy and his attitude to people.

Along with many others, a number of whom are in this room, I was lucky enough to learn from him directly. My ambitious hope tonight is that some of you will learn something useful, something practical and maybe even profound—not from me, but from Paul.

If I can, I would start with some biographical information. 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. The family moved to England for a period, which I will make relevant later. He attended this (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 continued to work with the Public Solicitor's Office for a time after he was admitted as a lawyer.

He was called to the Bar in 1979 at the age of 29 and was appointed as a Public Defender, where he worked for a number of years with some truly great defence lawyers like Peter Hidden QC and Steve Norrish QC, both of whom would become judges but neither of whom ever forgot where they came from. Steve Norrish recalled, in the obituary I mentioned at the outset, that year after year Paul won a trophy which was given out for the most industrious Public Defender.

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.

Jumping backwards, if I can, Paul became the director of the NSW Attorney General's Criminal Law Review Division in 1983 and the full-time commissioner of the NSW Law Reform Commission in 1984. This was at a time where 'law reform' in the criminal law involved something other than increasing maximum penalties and standard non-parole periods, or expanding the scope of criminal liability by imputing intent where there previously was none. Paul achieved a lot in his time as an adviser to the Attorney General. But his greatest contributions remained ahead of him.

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 *Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13.

And that is the first of Paul's great, big, famous High Court cases to which I will refer. It was not the first chronologically, but Paul's contribution to the law as a barrister can be gleaned from a review of his cases in the High Court, some early on as a junior, but most often as a leader. I realised after I had prepared this speech that I had missed a number of his cases, and at least in one case I had blocked it out because it was such a shocking loss for us. But of the cases I did remember, and will discuss tonight, just those alone are an amazing array of cases of great importance.

I'll come back to talk about his cases, but before I do I want to interpose three things. The first concerns Paul's early work. When news got out that I was to give this speech, lots of people called and wanted to talk about Paul's impact on their lives and careers. One such person was Justice Peter Johnson. Peter Johnson has just left the Supreme Court after an extraordinary 17-year career on the bench. Peter is quite a scholar and I don't think he throws very much out. That's a trait he shared with Paul. Peter left this beautiful note on my desk as he was packing up his chambers:

> Peter, I'm not sure if you have this 'first edition' by Paul Byrne – 'Briefnotes' published by the Public Solicitor.

As you would expect, a great publication which was much sought after by the criminal Bar and solicitors.

Best wishes for the Paul Byrne lecture.

Regards,

Peter

8/6/22.

And attached to it was this remarkable thing, which was something that Paul had created in his early time: a hard copy of the first ever edition of 'Briefnotes',[8] which is up here if you feel like having a look at it. Don't spill red wine on it, because I think I should give it back to Justice Johnson. It was a dense summary of recent law, criminal and civil, prepared periodically by Paul when he was a public solicitor. It covers scores of topics in closely typed pages, and I mean typed, actually typed pages. It speaks volumes of Paul's work ethic, and that's one of the things that I want to urge you to consider to be one of the key lessons from Paul's professional life. That was in 1978. He did not stop working hard for his colleagues and his clients until weeks before he died in May 2009.

The second thing I want to mention, before I turn to *Domican v The Queen*, is to explain the title of tonight's lecture. I called it 'They're all good cases' because this was, perhaps, the most valuable lesson that Paul taught me. I think it's fair to say that I was quite an anxious barrister. I tried to hide it in court and in conferences with clients, but I shared my anxiety rather too readily in chambers (and I think the Chief Judge at Common Law is probably thinking nothing has changed at this time, and so might others, I'm sure, such as my neighbour Justice Natalie Adams). This was not a fault that Paul shared. Quite to the contrary, he was always calm or always seemed calm. I asked him once, driving back from Canberra, 'how are you so nice all the time, how do you never get stressed?' And he said, 'you don't see me at home'. Well, my guess is he was really lovely at home too.

[8] New South Wales Public Solicitor's Office, *Briefnotes* (1978) Vol 1(1).

But drifting back to the title of the talk—it stems from an occasion, maybe more than one, 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. But, whatever it was, I was in full-flight whinge mode. 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.'

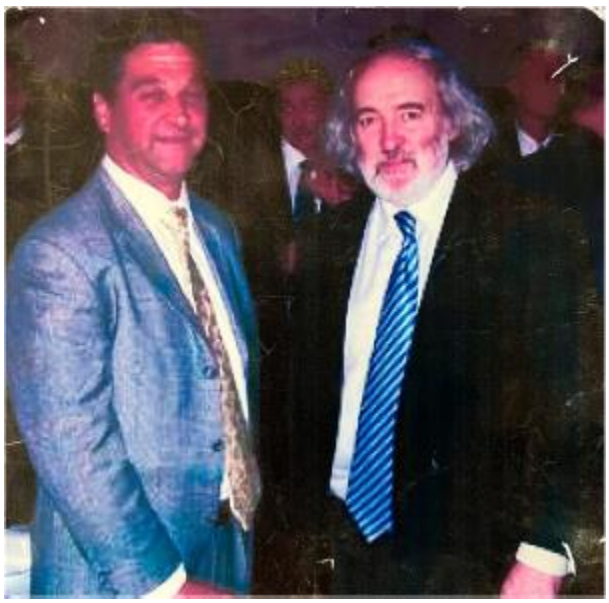

Figure 3. Photograph of Justice Hamill and Paul Byrne.

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, and as I say it was without any judgment, 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.

And the third thing I want to interpose before coming back to *Domican* and Paul's win there (sorry, that's a spoiler) is why he was a mentor to so many people. I was one of the lucky people to whom he was a mentor. My other great mentor was Justice Mary Gaudron.

What I was going to say here was, 'and again, I am delighted and very touched and honoured that she is with us here tonight'. But, she's not! We arranged for her to come here and then to have dinner, and she texted me—or called, she doesn't text actually, the government might be watching if she texts—she called me and said that she wouldn't make the speech but would see me at the restaurant. So, she showed some judgment I think.

Anyway—she will hate what is about to happen—she was another Sydney University Medallist, and she went on to achieve a few things in the law. Her advice to young lawyers was, and remains—she said it to almost all my associates over the last seven years—'get out there and make trouble. It's the least you can do'. I don't doubt for a moment that Paul Byrne would have utterly approved of that. I think it fell within the umbrella of his wise words to a stressed-out young barrister all those years ago: they are all good cases. And, so, how do I tie together these two disparate things? Mary was one of the authors of the joint judgment in *Domican v The Queen*.

Domican v The Queen

Tom Domican was convicted by a Sydney jury for shooting at a gangster called Christopher Dale Flannery with intent to murder him. The prosecution relied upon circumstantial evidence and, critically, on evidence of identification provided by Mr Flannery's wife. She said the gunman was Mr Domican. But, she did not know him and that identification came something like nine months after the shooting. There were other weaknesses in her testimony that were drawn out and emphasised by defence counsel at the trial: the shooter was wearing some sort of silly disguise, the observation was fleeting and so on. The trial Judge gave full directions about all of that, but he did not emphasise, and give his own support to or imprimatur to, the weaknesses that had been raised on behalf of Mr Domican. Paul was led by Peter Hidden QC. Paul made the submissions in reply.

The High Court held that the directions and warnings were insufficient to cure the potential dangers of the identification. It held that it didn't matter that the prosecution relied on evidence other than Mrs Flannery's. The Court held that because it was possible for the jury to convict based on her evidence alone that it was necessary for the Judge to give strong and detailed warnings about the dangers, and it was insufficient to rely on counsels' arguments. That case can still be used today if counsel is not satisfied that a trial judge's summing up sufficiently emphasises the danger.

I then move to *Saraswati v The Queen* (1991) 172 CLR 1; [1991] HCA 21. *Domican* was not Paul's first win in the High Court. He had previously, two years earlier in 1990, appeared in the case of *Saraswati* and another case called *McKinney and Judge v The Queen* (1991) 171 CLR 468; [1991] HCA 6.

Saraswati v The Queen

In *Saraswati*, the prosecution attempted to circumvent a two-year statutory limitation period on bringing charges of indecent assault where the victim was alleged to be aged 14 to 16. The Prosecutor charged what was undoubtedly an indecent assault, if believed, as an act of indecency to side-step the provision.

A majority of the Court (Toohey, Gaudron and McHugh JJ) held that the legislative scheme could not be used in that way because the true offence was statute barred. That case remains important, albeit that the legislation has been changed about forty or fifty times since, to questions of statutory construction and the use of a Prosecutor's power to selectively frame an indictment to dodge a legislative protection within a penal statute.

McKinney and Judge v The Queen

McKinney and Judge was a case that changed the face of policing in New South Wales. It was a matter of great notoriety in the late 1980s that convictions were often secured by what were not-so-lovingly known as 'verbals'. That is, in the absence of any evidence of guilt, police would concoct or fabricate admissions. Sometimes they were signed, sometimes they

were in writing, sometimes they just relied on a policeman's say-so. The situation had become quite scandalous. Well, Peter Hidden, Paul Byrne and a majority of the High Court put paid to that.

Both Messrs McKinney and Judge had signed confessions while held in involuntary police custody. They admitted, in those confessions, their involvement in what these days would be called a serious home invasion. The majority (Mason CJ, Deane, Gaudron and McHugh JJ) revisited the issue of such confessions, which had been discussed a few years earlier in a case called *Carr v The Queen* (1988) 165 CLR 314; [1988] HCA 47, where a minority (Gaudron and Deane JJ) had said that warnings about this kind of evidence should be given. The majority stressed the position of special vulnerability of a suspect in police custody. It stressed the fact that, by then, there was electronic equipment that could record these sorts of things.

It is difficult, now, looking back, to appreciate the significance of McKinney and Judge. These days there are rules of admissibility and the *Evidence Act 1985* (NSW), and these days these sorts of pieces of evidence probably wouldn't even get before a jury. But in the late 1980s and early 1990s it was critical. It really, as I said earlier, had become a scandal. And Paul, who quoted the work of the NSW Law Reform Commission in his submissions to the full bench, played a very important role in addressing that.

George Patrick O'Neill

So, I'm now going to tell you about something quite different, and I'm moving away from the High Court for a moment 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. It is worth telling because, within the story, it has one of the lessons to be learned from the way that Paul Byrne practiced law.

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*.

I appeared on George's bail application: *R v George Patrick O'Neill* (Court of Criminal Appeal (NSW), 13 May 1992, unrep). 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 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 had 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 (and Mary Gaudron would be utterly

ashamed of me for having to say this, having learnt it that way), 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 (I see Gaby Bashir nodding and smiling at this moment). It didn't matter who had buggered 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. I will return to that, but I want to tell you another story about Paul's superior preparation which allowed him, again, to be just a little bit cheeky in the New South Wales Court of Criminal Appeal.

R v Henry and Ors

In 1999, the Court of Criminal Appeal, under the leadership of Chief Justice Spigelman, decided a series of cases where guideline judgments on sentencing for frequently occurring offences were pronounced. The first one to come before the Court was about armed robbery: *R v Henry and Ors* (1999) 46 NSWLR 346; [1999] NSWCCA 111. It still gets quoted almost every day, I think, in the District Court. There were five offenders whose cases had been selected—lucky them. I was to appear for Mr Henry, and Paul represented a young man called Mr Tran in *Regina v Tran* [1999] NSWCCA 109. The appeal was heard by five judges of the bench and the case went over three or four days.

The most junior judge on the bench was Justice R S Hulme. He retired not very long ago as perhaps the most senior, I think, or one of the most senior Common Law judges and, sadly, has now passed away. In 1999, Justice R S Hulme was not the most vastly experienced criminal lawyer, but he was a formidable man. Not many people shared this view, but I always thought he was funny. I once got in trouble for saying 'good morning' in a courtroom, which I thought was hilarious, and I threw my pen down to cover up how funny I thought it was.

Anyway, going back to Messrs Henry and Tran: after the submissions relating to the general question of whether there should be a sentencing guideline judgment, and if so how many years it should be, the barristers got to make submissions on their individual cases. In the course of doing so, Paul described Mr Tran as 'virtually a first offender'. It was an ambitious submission.

I watched Justice R S Hulme reacting. At first he looked puzzled, as if he had missed something. Then he started flicking through his papers. Then he became quite agitated and kind of started to bounce up and down. As I say, he was a funny guy. After a few minutes, he finally interjected and took Paul back to the submission that his client was 'virtually a first offender' and he started reading out Mr Tran's criminal history. He said, 'but he has convictions for drugs and guns and dishonesty'. Paul said, 'oh your Honour, he doesn't really have a record of significance' and pretended that he was just going to move on. But Justice R S Hulme got back into him and said, 'but what about this conviction for drug supply?' Paul said, 'well, your Honour that was just a bit of cannabis'. And then Justice R S Hulme said, 'well, what about this other conviction for drug supply—it says heroin on his record'. Paul said, 'there's nothing in that your Honour, that was just a couple of foils at the Cabramatta railway station'. And then Justice R S Hulme said, 'well, what about this conviction here for possessing a firearm?' Paul said 'oh your Honour that gun didn't even work. I wouldn't worry about that'.

To be honest, things didn't go that well for Mr Tran. None of the respondents, including my client Mr Henry, did very well out of that case. Mr Tran's good behaviour bond was increased to a short gaol sentence. But Paul's rather courageous submission did find its way into Justice Wood's judgment at [17]: he said that Mr Tran had a minor criminal record that was 'somewhat typical of a young drug abuser'. I suspect that the then-Chief Judge at Common Law may have thought that Justice R S Hulme was funny too.

So, the point of that story and what we can learn from it is, again, preparation: know your client, be across all aspects of your brief. It's okay to be cheeky, but you've got to have the goods. Paul didn't just look quickly at his client's criminal record, he knew the facts of everything on that record. It was also a lesson in courageous advocacy. But again, his responses to Justice R S Hulme were calm and courteous and utterly persuasive. So, let me

return to the High Court and the case of *Crampton v The Queen* (2000) 206 CLR 161; [2000] HCA 60.

Crampton v The Queen

Gaby Bashir was Paul's instructing solicitor in the case of Crampton, and she told me a nice story about the hearing and Paul's skill as a barrister.

Crampton was a case concerning statutory construction of the word 'with', in the context of acts of indecency, and about directions that should be given where there is a delay in complaint, and those were the issues that were taken to the High Court on a special leave application. Justice Gaudron was presiding and she asked the first question, which was the tricky question, which was this: 'Mr Byrne, you have the difficulty, do you not, that this point has never been taken in any of the Courts below?' Gaby had the same sinking feeling that I had sitting next to Paul in George Patrick O'Neill's would-be appeal on bail mentioned earlier. She thought they were about to be hosed out in seconds.

But, on that day at least, Paul was Justice Gaudron's match. He not only persuaded them to take the points that he had gone there to argue, but also persuaded them that one of the critical points of principle that warranted the grant of special leave was the very question of when the Court should grant special leave when the point was not taken below. And it stands as authority for that to this day. This is another example of Paul's agility as an advocate.

Smith v The Queen

Most people know *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. More importantly, 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*—which is an exception to the opinion rule (section 75) based

on lay evidence—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. In fact, I got a message from Belinda Baker, who was appearing for the prosecution, and that's exactly what they thought was going to happen.

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' opinions could not rationally affect a fact in issue, that is, whether Mundarra Smith was the bank robber.

Justice Kirby in that ceremony in the Banco Court all those years ago 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 of 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.

Grey v The Queen

In *Grey v The Queen* (2001) 75 ALJR 1708; [2001] HCA 65, a majority of the NSW Court of Criminal Appeal found no miscarriage of justice where the defence was not put on notice that a critical informant witness had received a letter of comfort from investigating police.

Justice Simpson, who we also love, dissented. Her Honour insisted (correctly, as it turned out) that it was not for an accused person to undertake some complicated detective

exercise to discover material about such a fundamental matter going to a witness's credibility: *R v Grey* [2000] NSWCCA 46; (2000) 111 A Crim R 314.

Paul appeared in the High Court and, I think comfortably, persuaded the Court that the ground of appeal itself was made out. But the problem was that there was a whole bunch of evidence that might have suggested that the case against his client (in relation to his, like, guilt) was really strong. It was a complicated factual case about car re-birthing and dealing with stolen motor vehicle parts. There were a whole bunch of cars involved, and lots of counts on the indictment, and long engine and chassis numbers that had been switched between various cars.

Paul and I had dinner the night before the case was heard in Canberra. As always, he paid. As we spoke about the case, I had this unnerving feeling that his knowledge of the facts of the case was, I don't know, imperfect. When he left me to finish the very nice bottle of wine that he had bought, I thought the best hope we can have here is that the Court was not too preoccupied about the pesky facts. But this was the Gleeson High Court and detail mattered. And, Paul Byrne SC advocacy tip: it always does. So, it was no real surprise the next day when the Chief Justice started by peppering Paul with a series of detailed questions. Which vehicle is that related to, and which count on the indictment? Which chassis number was on that car and which engine number should that relate to? And why is that wrong? And how did it get there? And why was that important? And just what did that portend as to the likelihood that our client was not, I don't know, really, really guilty?

I grabbed for the appeal books and tried to work out where to start when I realised that Paul was answering every question, with appeal book references, calmly and firmly and bringing the Court back to the fact that, while this was all terribly, terribly interesting, none of it mattered if the jury didn't believe the Prosecutor's star witness. Again, the lesson is preparation. He knew every aspect of that brief and it was quite incredible to watch. My guess is he didn't sleep a wink after he left me that night. So, on that note, let's talk about motor cars.

Racing cars

Figure 4. Paul Byrne at Pebble Beach, California.

If there was one thing Paul knew more about than law, it was racing cars. Perhaps all fast cars, or maybe just any car with style and nice lines. I think it's fair to say that he was obsessive about racing cars and especially Formula 1. It seems remarkable—but maybe it isn't really—that Paul was born in 1950, which was the first year that the Formula 1 World Championship was conducted.

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. It was quite astonishing. He had especially made cylindrical cases made 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 IndyCar race. His knowledge was ridiculous, and it was infectious. I'm told by Jack that at one stage when he 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 was amused that I became a minor enthusiast and that I liked the 'red racing cars', which was referring to Ferrari. I think of him every week, or every other week, during the Formula 1 season. I wonder what he would have thought about this manoeuvre by a driver

or that decision by the stewards. It's just another way that I, and so many people, miss him. And we do miss him, all of the time. He was one of the kindest, most generous people that I have ever had the good fortune to meet. And I have realised over the last weeks just how many people feel the same. I used to think, and sometimes say out loud, that when I grow up, I want to be like Paul Byrne. But that's an ambition that I've given up on. First, I've decided not to grow up, and second, I just have to accept that my temperament isn't the same as his, not as pure as his.

Paul's son Jack tells me he 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. Jack shared with me that Paul's love of motor racing was born from his father's love of the sport. 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'.

That year, Sir Jack Brabham won the Formula 1 World Championship for Cooper, the first Australian to do so. As I say, Paul was nine at the time 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. He went to many, many more over the decades, all over the world. In 1985, he took the whole family to Adelaide for the first Australia F-1 Grand Prix in history. But going back to that day at Silverstone in 1960, 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. 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. I will come back to say a little more about that, but I have to tell you about some more dumb cases.

Figure 5. Paul Byrne at the Spa-Francorchamps F-1.

R v Markuleski

R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290 was an important case decided by five judges of the Court of Criminal Appeal. There was a conflict between the Court when there were three, so they decided to bring in two more judges. And so, I decided to bring in Paul Byrne. That case gave rise to what has become known, usually, as a '*Markuleski* direction'. Trial judges are required to tell a jury in cases involving multiple counts based on more or less the same evidence that if there's any doubt about one count, or any doubt about a particular witness, that must be taken into account in considering the question of proof beyond reasonable doubt of the other counts.

MFA v The Queen

Like *Markuleski*, MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53 was a case involving mixed, or what we tried to convince the Court were inconsistent, verdicts. At the special leave application in Sydney, the Court didn't need to hear from us, they just called on the Prosecutor, gave him a hard time for five or ten minutes and then granted us special leave. So, we travelled to Canberra with some confidence … we lost 6–0. But the three judges who had granted special leave (McHugh, Gummow and Kirby JJ) had to sort of, I don't know, avoid the shame of it and wrote a nice judgment about how the Court of Criminal Appeal hadn't quite approached it correctly.

That case remains one of the critical cases on the question of mixed verdicts and how that informs a question of whether a verdict is unreasonable. The other case is *Mackenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35.

In the great tradition of the NSW Bar, where one only speaks of cases where one was triumphant, or at least where the loss is not reported in the Commonwealth Law Reports, we won't mention *MFA* again. Other than to say this: Paul drove me to Canberra, Paul did all the work, Paul paid for all the meals, Paul drove me home. When we got to my place, where he went out of his way to drop me, he jumped out of his big comfy BMW 7 series, ran around to the back, pulled up the boot and got out a present for me: a little, perfect, model car marked with the date of the hearing and the awful letters 'M. F. A.' on the bottom.

He really was an outrageously generous man. He also loved his stationery, especially DYMO tape. He also gave me another perfect, little, model Ferrari. I think that's my favourite one. Paul told me that Princess Grace used to drive around Monaco in it, and it was especially designed for her. Both cars are here tonight. My little perfect replica Ferraris, neither of which is red, remain in my chambers in the Supreme Court to this day. They are two components of my shrine to Paul. I disrupted it for tonight's special event.

Figure 6. A replica of Princess Grace of Monaco's Ferrari, given by Paul Byrne to Justice Hamill.

At the bottom of the shrine is a green artistic baseball. That was purchased by Paul at the Guggenheim Museum in Bilbao. He was there and decided that I had to have it, so he bought it and brought it back from Europe for me. He did that stuff for people all the time. He would just send people magazines because they'd spoken about a subject that interested them. I wasn't special, but Paul made me feel special.

Antoun v The Queen

The Antoun brothers were charged with demanding money with menaces. Their defence was that they did demand the money, they did do it with menaces, but they asserted a claim of right. It was not an attractive defence.

During the judge-alone trial, the trial Judge refused a number of applications asserting that the Judge was disqualified from hearing the trial on the grounds of apprehended bias. The problems started when a 'no case' submission was made at the end of the prosecution case (bear in mind this is a judge-alone trial, with no jury). The Judge refused the application

without submissions from counsel. Counsel protested and insisted on being heard, and the Judge relented and said: 'right, now when I've heard those submissions will you be in a position to proceed with the defence case?'[9] It wasn't going so well for the Antoun brothers. A second application, based on the reasons for that decision, was also refused.

Then, part way through the defence case, the Judge announced that he was going to revoke bail, and then he did. That prompted yet another application for his Honour to disqualify himself. The Antoun brothers were ultimately convicted.

Justice Sully presided over the bail application, and he described, with his typical directness and eloquence:

> I do not think it could be contended sensibly that the learned trial judge approached the question of the revocation of bail with anything like the particularity required.[10]

However, the NSW Court of Criminal Appeal found a way to dismiss the appeal anyway. The High Court overturned their decision, saying at [85] that there was an 'unmistakable' appearance of pre-judgment. The Court of Criminal Appeal decision was overturned in spite of the unattractiveness of the defence of claim of right, which the Chief Justice, Murray Gleeson, said at [12] was 'optimistic in the extreme'.

I should be cautious that we are not going to go over time, by too much anyway. So: two more big cases decided after Paul's advocacy were *BRS v The Queen* (1997) 191 CLR 275; [1997] HCA 47 and *Azzopardi v The Queen; Davis v The Queen* (2001) 205 CLR 50; [2001] HCA 25. I mentioned earlier a case that I blocked out, which was *The Queen v Lavender* (2005) 222 CLR 67; [2005] HCA 37, so we're not going to talk about that, but that's another important case. Another one was *Weininger v The Queen* (2003) 212 CLR 629; [2003] HCA 14. They were both losses—so I don't know what was happening in my mind when I prepared this speech.

[9] *Antoun v The Queen* (2006) 80 ALJR 497; [2006] HCA 2 at [68].
[10] *R v Antoun; R v Antoun* (Supreme Court (NSW), 28 August 2003, unrep) at 18-19.

So much more than an appellate lawyer

I want to move on from the High Court because, from what I have said to this point, you probably think, well, Paul was a great appellate advocate. But the thing I haven't mentioned is the most remarkable thing about Paul Byrne: he 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.

But 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. I don't think I can remember him saying anything bad about anyone. Justice Hament Dhanji told me that the harshest thing he ever heard Paul say of anyone was: 'I can't cop that bloke'. That was it.

In one of our joint trials, Paul asked one of the most effective questions I've ever seen in cross-examination. He was cross-examining a police detective, who was being interrogated as to why he hadn't investigated particular aspects of the case, and his evidence was becoming increasingly silly, and probably dishonest, justifying the failure to investigate. At one point the detective came to the end of a very long, non-responsive answer, and Paul just looked at him with his big wide eyes and said: 'aw, come on?'

Now, 'aw, come on?' is not a submission that gets much traction in the appellate courts. But in that trial courtroom, that day, in front of that jury, it was absolutely devastating. The jury loved it and the copper was toast. And the jury loved it because they loved Paul, they trusted him. He was so obviously sincere and honest. That wasn't really a question—'aw, come on?'—it was the culmination of days of attentive, honest and courteous advocacy.

Another moment in a different trial 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 (a historical relic that you can read about in the history books) and I knew he was dangerous and partisan. We had agreed (which I think means Paul told me) that I would go first in cross-examination. Paul could feel my anxiety levels rise as the doctor walked to the witness box. The doctor was very dappily dressed for his big day out and his performance, and he swaggered to the witness box. My stress levels were high, and Paul just gently 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'.

Even the Prosecutors loved Paul Byrne

I've got little headings throughout this speech—this one says, 'Even the Prosecutors loved Paul Byrne', and I know this to be a fact, because he was never aggressive, he was never losing his cool, and he was never impolite or discourteous to his opponent. Every Prosecutor that I've spoken to remembers Paul fondly. They knew he would be honest, they knew he would never rely on dirty tricks, they knew that he would never embarrass them in the courtroom, and he was unerringly polite and decent.

Having said that, I am told on very good authority (let's hypothetically call that authority Justice Natalie Adams) that there was a 'Wanted' poster in the appeals unit at the Crown Prosecutor's chambers. The Wanted poster was for Paul, who was 'Wanted for late submissions'. This 100% rings true to me. Paul was always late with submissions. He would be proud of the fact that Oliver, who helped me today with the last version of the PowerPoint display, and the Chief Justice, who didn't, and I finished, still writing this speech, just a little while ago. He was always late.

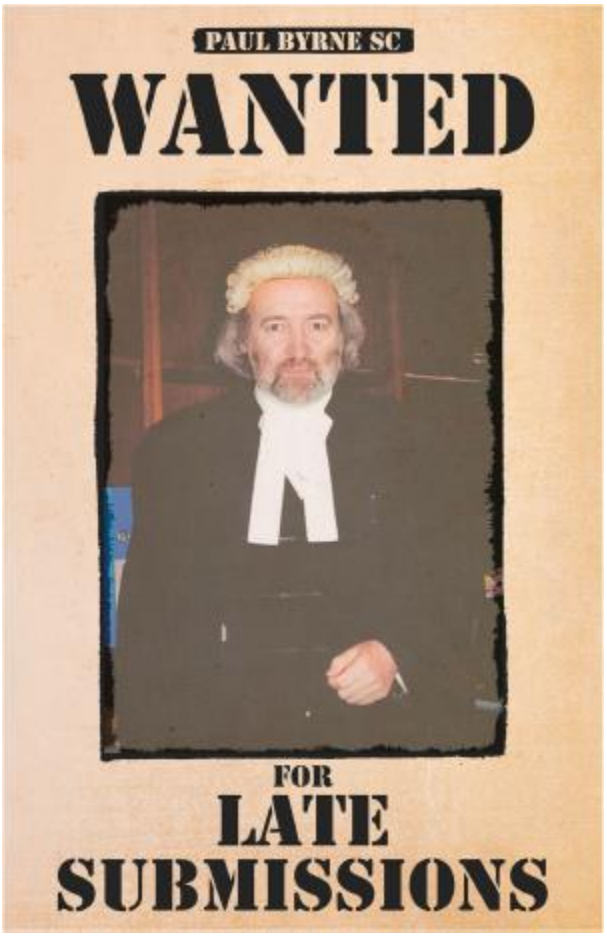

Figure 7. A recreation of the Wanted poster from the Crown Prosecutor's chambers.

One Friday afternoon I was stressing out about some submissions where we had gotten an extension, and extension after extension, and it was due at 4 o'clock. He just couldn't get what was worrying me, and he said to me: 'don't worry. There is no relevant distinction between 4:00pm on Friday and 9:00am on Monday'.

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.

Justice Natalie Adams told me that she was a relatively junior lawyer in the criminal appeals unit at the NSW Director of Public Prosecution's office and she watched Paul run lots of these appeals in the Court of Criminal Appeal and was struck by his courtesy and good manners. She was a big fan and held Paul Byrne in awe. She assumed Paul didn't know who she was, really. Then one day at court, he came running up to her and said, 'hey Nat, I've got a tricky one today. What do think about this?' and asked her all sorts of questions about the facts of the case and the law because he really wanted her opinion (showing good judgment I might say), which came as a shock.

Elie Rahme was telling me a story the other night at dinner about being a junior solicitor who had just started in the law. He came up to Forbes Chambers to deliver a brief on an appeal. He had read the case but had never met Paul. When he went into the room, he was confronted by the ordered chaos and this kind of crazy professor-looking man sitting in a Recaro racing driver's chair, surrounded by paper, expensive stationery and perfect little model racing cars. He asked the somewhat silly question, I have to say, of whether Paul was into Formula 1. Elie was too. They chatted about Ayrton Senna, Alain Prost and Michael Schumacher for about an hour, when Paul finally said, 'I suppose we better talk about your appeal'. Six months later, Elie saw Paul rushing into the Downing Centre, late, and Paul saw him and diverted, and came over and spoke to Elie. Elie could not believe that Paul remembered his name. But of course he did.

Jason Barakat, who was with us at dinner that same night when Elie told me that story a few weeks ago, said the same thing happened to him and he was astonished that this senior practitioner was interested in this baby lawyer's opinion, and then remembered him months later.

I have a friend from country Queensland called Scott. He is now a reasonably distinguished artist, but in those days was a moderately successful graphic designer in Brisbane. He came to Sydney for love and quickly became an unemployed graphic designer. He had no work. I had just moved rooms in chambers and asked him if he wanted to do some painting and paint the walls. So, he came in, and in the process he met a lot of the people

from Forbes Chambers and he met Paul. I had bought Paul's room, which became Hament Dhanji's room, and Paul had moved into the fancy room, which Hament and I both followed him into over time. The room was fitted out in, I suspect, very expensive wooden bookcases and shelving. Paul had the idea that there must be a way to transform the room so that the shelving was shiny and black, like the duco of a racing car. This would be better to display his helmets and tiny, little, perfect racing cars, of course!

So, Scott was commissioned to make this transformation. He was in that room for months, fastidiously putting coat after coat after coat of paint on this wooden shelving. I sent Scott a text and asked him for his memories of Paul, and I just want to share some of the things he said:

> A gentle man in the true sense of the word … paper everywhere but order with his F1 paraphernalia. I was in there for ages. He never showed the slightest impatience with the slow job and quite possibly the slow operator.
>
> Whatever was happening in court he was charming and genial company in his chambers despite drop sheets, fumes and the air of chaos.
>
> It was actually a terrible job to do but he was such a good bloke that it didn't matter.
>
> He made me feel like a colleague rather than the help.

That's how Paul treated everybody. People loved his courtesy and charm. He was unflappable in court. He was a pretty shit cricketer, but he tried real hard and we loved him.

Figure 8. Paul Byrne leaving the cricket pitch.

So, the lessons we can learn from Paul are these:

- Always be prepared. There is always something else you can do. There's some other authority you can read or some other investigation you can make. Know your file, know your brief, know your client, know your victim.
- Always know the source of the power and the jurisdiction of the court you are in.
- Always be polite and courteous. Treat everybody with respect and common decency.
- Have a passion, have an outlet. I haven't mentioned country music, but Paul once jumped up on stage at the Revesby Workers' Club to join Gene Pitney. Gene didn't know what had happened. Paul loved his country music. But the passion that he had for racing cars, and Formula 1, and travel, and country music just took him outside of the stress that he must have always been under (because if I was waiting on submissions, so were another 20 people).
- Be generous. You can't take it with you. My ex-partner once said of Paul when we were sitting in a nice restaurant in California: 'that Paul Byrne should write a book: "Any-where on $1000 US dollars a day"'. Paul always tried to pay, and generally succeeded. He treated the staff at restaurants well. He tipped big.
- Be brave, be cheeky, make trouble. It's the least you can do. Make that ambitious submission, but always have the goods to back it up.
- Consider the opinions of everybody. There is no monopoly on being correct.

I'm going to tell one last story. First, I just want to thank Teela Reid, who wasn't able to make it tonight but helped me with the acknowledgment of country. I want to thank Jack Byrne for the beautiful stories he told me and shared. There were about 40 or 50 other racing car stories that I didn't get to. Thank you to Oliver and Teresa, my staff, for putting up with me—I suppose I should include the Chief Judge at Common Law Robert Beech-Jones as well—and Oliver for the beautiful slideshow. Gaby Bashir also shared a lot of thoughts, so thank you to you all.

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.

Figure 9. Photograph of Paul Byrne.

Figure 10. Photograph of Paul Byrne's chambers.

Figure 11. Photograph of Paul Byrne's collection of racing car helmets.