On 4 May 2016 the High Court delivered its decision in *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16. *Attwells* concerned the scope of advocate's immunity, an issue of close interest to readers of this journal.

In *Attwells* a legal practitioner advised a client to settle on particular terms. The advice was given during an adjournment, and over the course of the evening, of the first day of a hearing. The client accepted the advice. Consent orders were handed up bringing the proceedings to an end. In due course the client alleged that the advice was negligent.

The NSW Court of Appeal held that the provision of this advice was within the scope of advocate's immunity, being work done out of court that was intimately connected with, and affected the conduct of, the case in court, such that the immunity was a complete answer to the claim.

The High Court allowed the appeal. The High Court declined to abolish the immunity. However it held that the provision of the advice was outside the protection of the immunity, because the immunity does not extend to negligent advice which leads to the settlement of a claim in civil proceedings. The court held further that the 'intimate connection' between the advocate's work and 'the conduct of the case in court' must be such that the work affects the way the case is to be conducted so as to affect its outcome by judicial decision (at [46]). No doubt the judgment of the High Court will be considered in more detail in a future edition of *Bar News*.

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Antonin Scalia died on 13 February 2016. He had been a justice of the United States Supreme Court for some thirty years, having been appointed in 1986. He was one of the most well-known of the Supreme Court justices, partly because of his vigorous judicial prose.

On the day following his death the remaining eight justices of the Supreme Court, and the three surviving retirees, each issued a statement. Justice Breyer said that Scalia was 'a legal titan'. Justice Kagan said: 'Nino Scalia will go down in history as one of the most transformational Supreme Court justices of our nation'. Justice Alito said: 'He was a towering figure who will be remembered as one of the most important figures in the history of the Supreme Court and a scholar who deeply influenced our legal culture.'

Justice Ginsburg's statement included the following:

> Toward the end of the opera Scalia/Ginsburg, tenor Scalia and soprano Ginsburg sing a duet: 'We are different, we are one,' different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve. From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all the weak spots-the 'applesauce' and 'argle bargle'-and gave me just what I needed to strengthen the majority opinion. He was a jurist of captivating brilliance and wit, with a rare talent to make even the most sober judge laugh. The press referred to his 'energetic fervor,' 'astringent intellect,' 'peppery prose,' 'acumen,' and 'affability,' all apt descriptions. He was eminently quotable, his pungent opinions so clearly stated that his words never slipped from the reader's grasp.

One of the matters to which Justice Ginsburg makes reference – Scalia's propensity in dissent to excoriate the reasoning of his fellow judges – is worth looking at further: it can illuminate some fundamental differences in judicial approach.

A decision he handed down in June last year is one example. *King v Burwell* 576 US ___ (2015) related to the provision of health insurance, an important social issue in the United States. The legislation under challenge in the case had been enacted with the clear purpose of increasing the number of persons with health insurance.

In particular the legislation sought to increase insurance cover by: limiting the ability of insurance companies to decline cover or increase premiums, including by reason of an insured's pre-existing health condition; requiring or encouraging persons to maintain insurance cover; and giving tax credits to certain persons to make the insurance more affordable.

In addition, the legislation contemplated the creation of 'exchanges' – marketplaces where people can compare and purchase insurance plans, usually online. Tax credits were available to persons who purchased insurance on (to use the language of the relevant section of the legislation) an 'exchange established by a state'

The issue in the case was whether tax credits would also be available to person in states that had a federal exchange.

The opinion of the Supreme Court was delivered by Chief Justice Roberts. The chief justice acknowledged that the legislation suggested on its face that tax credits were available only to persons who had bought them on an 'exchange established by a state'. However he also observed that the legislation contained 'more than a few examples of inartful drafting'. He said that applying the law as written would imperil the viability of the entire legislation. He held that the words of the section needed to be considered in the context of the legislation as a whole and that, 'the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.' Thus the decision of the court was that tax credits were available to persons who bought insurance on either a state or a federal exchange.

Justice Scalia would have none of this. He filed a dissenting opinion, in which Justices Thomas and Alito joined. His reasoning was pithy as ever. The first paragraph was in the following terms:

> The Court holds that when the Patient Protection and Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government'. That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

Justice Scalia went on to savage the court's opinion as 'pure applesauce' (this was not the first time he had dismissed the majority's efforts at statutory interpretation as 'applesauce': see *Zuni Public School District No 89 v Department of Education* 550 US 81 (2007) at 113) and 'jiggery-pokery', as defending the indefensible, as suffering 'no shortage of flaws' and for performing 'somersaults of statutory interpretation'. The following passage gives some flavour of the whole:

> [The Court] accepts that the 'most natural sense' of the phrase 'Exchange established by the State' is an Exchange established by a State. Ante, at 11. (Understatement, thy name is an opinion on the Affordable Care Act!). Yet the opinion continues, with no semblance of shame, that 'it is also possible that the phrase refers to all Exchanges – both State and Federal.' Ante, at 13. (Impossible possibility, thy name is an opinion on the Affordable Care Act!).

Of course underpinning all this is an issue about judicial method. On the one hand, the court construed the legislation in a way that gave effect to what it perceived to be the legislative purpose. Scalia simply gave effect to the language of the legislation, come what may.

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In the present issue of *Bar News* Richard Herps considers the impact of a recent decision on the doctrine of constructive murder. The facts in that case read like an episode of *Breaking Bad* – but in Ryde, not Alburquerque. A man and a woman were cooking meth in a residential house. Some apparatus ignited. The man died of his burns. The woman was charged with murder.

At first glance the charge seems anomalous. The woman may have been involved in the preparation of methylamphetamine, but she didn't mean to kill anyone. No doubt the last thing she wanted was an explosion her meth lab, let alone one fatal to her accomplice. The fire had been inadvertent – the result of an accumulation of vapour from solvent used in the cooking process.

At trial she was acquitted of murder. But the Court of Criminal Appeal quashed the acquittal. It was sufficient for a charge of murder that the woman had been involved in a joint criminal enterprise, namely the manufacture of a commercial quantity of methylamphetamine, and that the explosion was within the scope of that enterprise. A new trial has been ordered.

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Elsewhere in this issue Stephen Odgers SC and Richard Lancaster SC consider the reasoning and implications of the recent decision of the *High Court in IMM v The Queen* [2016] HCA 14. David Chitty looks at potential issues arising from the shooting down of Malaysia Airlines flight MH17. Tony Cunneen looks at some important bar history from the First World War.

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