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**BEAUTY AND TRUTH: RE-DEFINING LEGAL ARTISTRY'S NORMATIVE
ASPIRATIONS**

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Abstract

Judges are responsible for creating case law, and each case is important, because each develops (in theory) the body of law as a whole. Each judgment should be able to meet the definition of 'art' that I will set out and apply in this thesis. Where a judgment meets that test of art, it will be successful in relaying the 'truth' of the law in a rich, lasting and forceful manner. It is important for case law to relay the truth of the law in such a way because case law's function is to communicate and reinforce social values by recognising and applying universal principles of justice and fairness to situations that arise from social life.

In summary, this thesis examines whether the each of the main cases that have developed the duty of care test in negligence meets the criteria in the definition of art set out in this work, so that they may be called works of art. Each of the relevant cases will be evaluated to see: whether each embodies a 'system of rules and principles' (rules and principles being separate concepts) as these relate to the duty of care test; and whether each may be called beautiful. For, a work of art is one that incorporates all of these aspects: rules, principles and beauty.

I will define what art is, and I will describe art's function in the world. I will explore and define the concept of truth, as it relates to this thesis, and I will attempt to make clear the analogy between truth as Idea (in the Greek sense) and the law as Idea. Further, I will look at the context in which the judicial opinion is created, and I will consider the responsibilities judges have to reason by analogy under the doctrine of precedent.

*Then, I will consider the concept of beauty itself, and how it affects us as those who experience the work. Finally, I will show that the concept of 'duty of care' in negligence, leading up to and culminating in Lord Atkin's dictum in *Donoghue v Stevenson* (1932) AC 562 (HL), has been developed by judges so that only 50% of*

the cases considered meet the test of: a system of rules and principles governing that particular aspect of the law; and beauty. Thus, only the cases that meet the test will be considered to be successful in conveying the truth of the law (and allowing us to access that truth) in a rich, lasting and forceful manner, because this is art's function in the world.

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Introduction

Judges are responsible for creating case law, and each case is important because it adds (in theory) to the whole. I will argue that it is imperative that each judgment meets the definition of ‘art’ that I will set out and apply in this thesis, and I will seek to show why that is so. Where a judgment meets the definition of art, it will be successful in relaying the ‘truth’ of the law in a rich, lasting and forceful manner. An important co-requisite of the test, of whether a judgment can be defined as art, is that it must also be a work of ‘beauty’.

Why should each judicial text relay the truth of the law in a rich, lasting and forceful manner? Law is a means of social control, and it fosters social order in society by communicating and reinforcing social values. The law must be taken to be always speaking, and every person must live with certainty of the substance of the law. The law’s vital function in society means that judges have a responsibility when writing judgments to act ethically and apply sound moral practice. As Aristotle says, natural law precepts are the true law; they are the Idea of law. The Idea is the constant and natural law, and it is one which beings inherently know at their core to be ‘true’. Case law should be able to apply and communicate the true principles of the law in a rich, lasting and forceful manner because of the important social and moral function of judge-made law.

The present thesis examines whether the each of the main cases that have developed the duty of care test in negligence meets the criteria in the definition of art set out below, so that each case may be called a work of art. In particular, I will focus on the definitional elements of truth and beauty.

Firstly, I will analyse the duty of care case law in order to ascertain whether each case embodies the Idea of law, that is, whether it exemplifies a ‘system of rules and principles’.¹ Secondly, I will consider the cases to see whether each of them

¹ Rules and principles will be treated as separate entities in the definition of art infra at 9.

may properly be called beautiful. I will show that a work of art is an entity that embodies rules and principles as well as being beautiful.

Beauty is a vital component of case law, as the ‘truth’ (the ‘principle’ aspect of our definition of art) of a judgment must be easily accessible to lawyers and lay-people alike. I will show that it is through beauty that truth shines most richly, lastingly and forcefully.

Before looking at *how* we are able to access truth in a work of art (ie, before examining the phenomenon of beauty), I will define what art *is*, and I will describe art’s function in the world. Having discovered art’s function, which will be explained as conveying truth in the world, I will explore and define the concept of truth, as it relates to this thesis. The question to be answered in this section is what is it, exactly, that art conveys through being a work? I will examine the concept or Idea of truth, based predominantly on ancient Greek² conceptions of the relationship between humans, the world and the heavens.

Next, I will attempt to make clear the analogy between truth as Idea (in the Greek sense) and the law as Idea (in Aristotle’s natural law sense). Put another way, I will explore and define the concept of truth in law, particularly as it relates to judicial opinions. I will argue that the legal conception of truth in a judgment, set out in the principle of the case, is analogous to the universal Idea of truth. Further, I will look at the context in which the judicial opinion is created, and I will consider the responsibility imposed on judges to reason by analogy under the doctrine of precedent (this is the ‘rule’ aspect of our definition of art).

Then, I will analyse several of the main cases that have developed the concept of ‘duty of care’ in the tort of negligence, with a view to exploring whether in this area of judicial opinion the truth or principle has remained constant throughout its

² I will refer to ancient Greek beliefs in the present tense, as I believe they continue to be highly relevant to today’s society. Thus, Socrates, Plato and Aristotle will also be referred to as if they were living and presently speaking.

development. More specifically, I will undertake the analysis with a view to seeing whether or not each judicial opinion meets the “system of rules and principles governing a particular human activity”³ portion of our agreed definition of art.

I will show that the concept of ‘duty of care’ in negligence, leading up to and culminating in Lord Atkin’s dictum in *Donoghue v Stevenson*,⁴ has been developed by judges so that only 50% of those cases meet the test of a system of rules and principles governing that particular aspect of the law. The courts’ expansion of the duty of care dicta has developed over time, and for the most part by way of the process of analogous reasoning. In half of the cases analysed, the essence of the duty of care test (ie, the principle or truth) has remained recognisable and constant, while being open (*aletheia*) to necessary revision in light of new factual situations.

The final question the present work considers is how does art convey truth in its work? Put another way, by what process does the truth appear to us as what *is* in the work? The vehicle for truth appearing in a work of art is beauty; the work must be beautiful if we are to meaningfully access the Idea in a work (judicial or otherwise). Here, I will consider the concept of beauty itself, and how it affects us as those who experience the work.

In order to see whether the duty of care case law affects us in the requisite manner (ie, whether it is beautiful), I will briefly analyse those of the judicial opinions that I consider meet the ‘system of rules and principles’ test in our definition of art. The reason for leaving out the cases that fail the first part of the definition is because, as I will show, beauty and truth are inextricably linked; there cannot be beauty in a work without truth, and *vice versa*. This is not to say that we will take it as a given that the true judgments reviewed here are beautiful, it is prudent to show that this is so. I will conclude that all of the 4 judgments considered in this section are in fact

³ A fuller explanation can be found *infra* at 9.

⁴ *Donoghue v Stevenson* (1932) AC 562 (HL).

beautiful, and I will explain why I think this so with reference to the concept of beauty utilised in the present thesis.

Finally, I will return to our agreed definition of art. I will set out my findings from the above two analyses of the duty of care case law (in relation to truth and beauty), and refer these back to the definition of art. I will conclude that in 50% of the cases considered, both aspects (ie, a system of rules and principles, and beauty) of the definition are met, and that these cases may properly be called art-forms. Therefore, these cases will be considered as being successful in conveying the truth of the law (and allowing us to access that truth) in a rich, lasting and forceful manner, because they meet the test of art, and because this is art's function in the world.

I will conclude that the remaining 50% of cases considered do not meet the definition of art set out here, because both aspects under consideration (ie, truth *and* beauty) need to be met, and the remaining 4 cases do not meet the former part of the test. Therefore, these cases will be considered as being unsuccessful in conveying the truth of law in a rich, lasting and forceful manner.

Chapter I Truth and Art

1.1 Art's Nature

*The New Penguin English Dictionary*⁵ defines art in two main ways:

- (i) “works⁶ produced using skill and creative imagination”; and
- (ii) “an activity which requires a combination of practical knowledge, judgement, and imagination”.

⁵ Allen, R (ed) *The New Penguin English Dictionary* (2000). I have deliberately used a commonly held and easily accessible dictionary for the meaning of ‘art’, as opposed to compilations such as the Grove Art Dictionary or the Online Etymology Dictionary. I wanted a plain, everyday, meaning of the term because ‘art’ should be easily accessible and understood by the whole community.

⁶ The term ‘work’ is referred to in common usage as including literary, visual and musical works. *The Penguin English Dictionary* defines work as, *inter alia*, “something produced in a specified way, [a] thing”, and “something produced by the exercise of creative talent or effort”.

In addition, the *Collins English Dictionary*⁷ defines art as:

- (i) “the creation of works of beauty”; and
- (ii) “the system of rules [and] principles governing a particular human activity”.

Taking both of these definitions together, in reference to written works, art can be defined as those works dealing with rules and principles governing human activity, produced using skill and imagination, which require knowledge and judgement, and which are beautiful. This amalgamated definition is the one I will use as a reference point, throughout the thesis, in order to see whether the duty of care case law considered may be defined as ‘art’.

Broadly, this thesis examines whether the cases that have developed around the duty of care test in negligence meet all of the criteria above, so as to be called works of art. Judicial opinions ought to meet our reconstituted definition of art because, if they do so, they will be successful in conveying the ‘truth’ of the law in a rich, lasting and forceful manner. Beauty is as important as the ‘truth’ of a judgment, because it is only through beauty that truth can shine. The truth of a judgment is its principle, often but not always stated as part of the *ratio* of the case, whereas, the system of rules aspect of our definition of art relates to the secondary rules that make our system of law work (ie, the doctrine of precedent, the rules governing *ratio* and *obiter*, and reasoning by analogy).

Law is a means of social control, and it fosters social order in society by communicating and reinforcing social values. As every person should be able to live with some certainty as to how the law applies in daily life, the law must be accessible and applied as if it were ‘always speaking’. Law’s vital social function places upon judges a responsibility when to act ethically and apply sound moral practice when judging. As will be shown, the Idea of law is the constant and

⁷ Butterfield, J (ed) *Collins English Dictionary* (6th ed, 2003).

natural law. The essence of law is one which beings inherently know at their core to be 'true'. Case law should be able to apply and communicate the true principles of the law in a rich and lasting manner because of the important social and moral function of judge-made law.

The artistic factors of truth and beauty in a judgment are the main focus of this thesis, although it considers the case law below in light of the system of 'rules' aspect of our definition of art, also. As to the remaining aspects of the definition of art, I consider it acceptable to take as a given that these are present in all judicial pronouncements. All judicial opinions are literary works, produced using skill (all judges have legal skills) and imagination (for example, imagination in the sense of creating *obiter*, on hypothetical facts), and which require knowledge and judgement (case law requires both because of its nature as a medium between the law and the facts).⁸

Before looking at *how* truth gets expressed through a work of art (ie, before examining the phenomenon of beauty), we need to know what art *is*. Put another way, we need to understand art's *function* in the world.

I.II Art's Function

The ancient Greek word for art is *techne*. The term *techne* denotes a "sense of being well versed in something, of a thoroughgoing and therefore masterful *know-how*."⁹ Part of this 'know-how' is "knowledge of the rules and procedures for a course of action."¹⁰ Put another way, art includes knowledge of a 'system of rules'.

In order to properly understand the word *technes*, it would be instructive to examine its opposite. The latter is called *physis*, which may be translated into the

⁸ See generally White, J B *The Legal Imagination* (1985) and Bagnall, G *Law as Art* (1996).

⁹ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 164.

¹⁰ *Ibid*, 164.

word ‘nature’.¹¹ Human-kind has always attempted to master *physis* by creating ‘things’, and the knowledge required to do this – to create - also falls under the Greek concept of *techne*.¹²

Martin Heidegger elaborates on the concept of *techne*, by saying:

[that] [f]rom the very outset the word is not, and never is, the designation of a ‘making’ and a producing; rather, it designates that knowledge which supports and conducts every human irruption into the midst of beings [ie, every human ‘creation’, as such]. For that reason *techne* is often the word for human knowledge without qualification.¹³

According to the ancient Greeks, we can only claim to have knowledge proper when we are no longer captivated by the subjectivity and the sensibleness of things. On the contrary, we acquire knowledge when we grasp the universal regularity in things.¹⁴ This is not to say the sensible has no place in knowledge or theory, that we must ignore common sense totally; rather, the proper place for the sensible is where it presents itself as a particular expression of universal law, that is, in a specific case to which universal knowledge must be applied.¹⁵

Heidegger goes on to explain that, by knowledge, *techne* always means “the disclosing of beings as such, in the manner of a knowing guidance of bringing-forth”.¹⁶ I interpret this passage to mean human beings create works of art, in the midst of nature, not only to master nature but to express themselves, to bring-forth their knowledge and skills into the world. I would surmise that one reason we do this is to create order among human beings, perhaps even to replicate the order inherent in the universe, in nature.

¹¹ Ibid, 81.

¹² Ibid.

¹³ Ibid.

¹⁴ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 16.

¹⁵ Ibid, 16.

¹⁶ Heidegger, supra n 9 at 81.

To have knowledge means to have ‘seen’, “in the widest sense of seeing, which means to apprehend what is present”.¹⁷ For Greek thought, the nature of knowing itself consists in the term *aletheia*, that is, in “the uncovering of beings”.¹⁸ The ancient Greek concept of truth is also *aletheia*, literally meaning ‘openness’, or ‘disclosure’, that is, the disclosure of beings, or of our Being-ness.¹⁹

Heidegger elaborates on the relationship between *techne* and Being when he says that knowledge, as experienced in the Greek manner, is “a bringing forth of beings in that it *brings forth...beings*”²⁰ into presence in the world. *Techne*, or art, brings us as beings “out of concealedness and specifically into the unconcealedness of [our] appearance”²¹; that is, art brings us into the openness of our Being-ness.

Heidegger tells us that the noun ‘Being’ calls by name what we mean by the *is* of a thing. It is within the “wealth of meaning in the ‘is’ [that] the essential fullness of Being shows itself.”²² Another way to say that the *is* of a thing is disclosed in a work of art would be to say that being or *aletheia* (truth) discloses itself in its presencing.²³ Thus, put simply, art discloses truth in a work – its *is-ness* or Being.

Seeing things in light of what is permanent and essential in them is part of the human process of recognition, for “what imitation reveals is precisely the real essence of the thing.”²⁴ Plato uses the term ‘remembrance’ to describe the way we ‘know’ the permanent essence of the idea when we see it.²⁵

¹⁷Heidegger, M *Poetry, Language and Thought* (trans) Hofstader A (1971) 59.

¹⁸ Ibid.

¹⁹ Gadamer, supra n 14 at 107.

²⁰ Heidegger, supra n 17 at 59.

²¹ Ibid.

²² Heidegger, M *Basic Concepts* (trans) Aylesworth, G E (1993) 38.

²³ Heidegger uses this term, ‘presencing’, to describe the way in which the ‘is’ shows itself in openness (*aletheia*).

²⁴ Gadamer, supra n 14 at 99.

²⁵ Gadamer, supra n 14 at 120. Gadamer is speaking about Plato.

Knowledge shows itself “in a mediating relation that derives from what is represented”.²⁶ The result is what the ancient Greeks call *theoria*.²⁷ Plato calls *theoria* ‘non-sensuous presentation’, also known as ‘super-sensuous presentation’ or ‘super-sensuous knowledge’.²⁸ The super-sensuous in Plato’s terms is the universal realm of the Idea, or Being. Heidegger puts it another way; he states that knowledge sets itself up as Being in the unconcealed (ie, the openness created by art).²⁹

Heidegger says that, for Plato, “the conception of knowledge as ‘theoretical’ is undergirded by a particular interpretation of Being.”³⁰ That is, the ‘theoretical’ is not merely something that is defined by its opposition to the ‘practical’, but it is itself grounded in our basic experience of Being.³¹

To experience something in life, means to attain it for oneself, so that it becomes part of oneself.³² To have an experience of something means that the something we experience “meets and makes its appeal to us, in that it transforms us into itself.”³³

Heidegger points out the similarities between Georg Wilhelm Friedrich Hegel’s conception of experience and his own concept of presencing (*Anwesen*), when he says that “[e]xperience, the presentation of the absolute representation, is the *parousia* of the Absolute.”³⁴ The word *parousia* simply means presencing.³⁵ Experience is the presencing of the absolute, that is, of essence itself.³⁶

²⁶ Heidegger, supra n 9 at 151.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Heidegger, supra n 17 at 61.

³⁰ Heidegger, supra n 9 at 152.

³¹ Ibid.

³² Heidegger, M *On the Way to Language* (trans) Hertz, P D (1971) 73.

³³ Ibid, 73-74.

³⁴ Bernasconi, R *The Question of Language in Heidegger’s History of Being* (1985) 83.

³⁵ Ibid.

³⁶ Ibid.

Taking Plato's example of bed-frames and tables in *The Republic*³⁷ to illustrate the concept of essence (of what it is that shows itself in the work), Heidegger puts the matter thus:

[T]here are many bed-frames and tables at hand, instead of a few; the only thing we must see is what is co-positd already in such a determination, namely, that there are many bed-frames, many tables, yet just *one* Idea bed-frame' and *one* Idea 'table'. In each case, the one of outward appearance is not only one according to number but above all is one and the same; it is the one that continues to exist in spite of all changes in the apparatus, the one that maintains its consistency.³⁸

Here, Plato describes the Idea, or the *is-ness* of that which is created; the true 'bed-frame', the true 'table' shows itself in *mimesis* (art), regardless of the form the representation takes. For Plato, it is only the Idea of ideas that makes a work meaningful (and, therefore, useful).³⁹

Heidegger considers that what makes a table a *table* (he calls this 'table-being') must be seen not through the eyes of the body, but through the eyes of the soul.⁴⁰ It is the soul that sees the *what-ness* of a matter, its Idea. What is seen is non-sensuous, to be sure, but we first come to know it as something sensuous, as a thing that is there as a table in physical form. Its essence, however, that which we 'know', is a thing's *what-being*, the Being of the being.⁴¹ Therefore:

knowledge must measure itself against the supersensuous, the Idea; it must somehow bring forward what is not sensuously visible for a face-to-face encounter: it must put forward or present.⁴²

In Plato's *Symposium*,⁴³ Socrates recalls a conversation he had with Diotima, from Mantinea, where she advises Socrates:

³⁷ Plato *The Republic* (2nd ed) (eds) Jones, C A and Radice, B (trans) Lee, D (1974) 20.

³⁸ Heidegger, supra n 9 at 173.

³⁹ Heidegger, M "The Way Back into the Ground of Metaphysics" in Barrett, W and Aiken, H (eds) *Philosophy in the Twentieth Century* (Vol 3) (1962) 185.

⁴⁰ Heidegger, supra n 9 at 150.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Plato *Symposium and Phaedrus* (trans) Griffith, T (1986) 22.

[that] [w]hat we call studying presupposes that knowledge is transient. Forgetting is loss of knowledge, and studying preserves knowledge by creating memory afresh for us, to replace what is lost. Hence we have the illusion of continuing knowledge.⁴⁴

Art dwells in the sensuous realm, the region of what the ancient Greeks call ‘non-being’.⁴⁵ Nevertheless, art shares in beauty, and as such is a way of letting the essence of beings appear. However transient art forms may be, they are imitations of the constant Being, the eternal and permanent Idea.⁴⁶

The word *techne* names, for the Greeks, not only art but also handicraft.⁴⁷ Both the craftsman⁴⁸ and the artist may properly be referred to as *technites*.⁴⁹ Aristotle believes that the object of the craftsman is to produce a product or work that can be called good, the goodness being “comprised in the work itself”.⁵⁰ He gives the example of a shoemaker, who aims at making good shoes, and he states that “the goodness of the shoes lies *in them*.”⁵¹ For Aristotle, the shoemaker must:

know what a good shoe is and how to make it: but this knowledge is, so to say, detachable from his character as a man. A shoemaker is good if his shoes are good: from the goodness of the shoes, we infer his goodness as a shoemaker.⁵²

How is the goodness of the object relevant to art’s function? Aristotle draws an analogy between the craftsman shoe-maker and a just person. Harold Joachim states that, for Aristotle:

⁴⁴ Ibid, 62.

⁴⁵ Dewey, J “Changed Conceptions of the Ideal and the Real” Barrett, W and Aiken, H (eds) *Philosophy in the Twentieth Century* (Vol 3) (1962) 323.

⁴⁶ Gadamer, supra n 14 at 32.

⁴⁷ Heidegger, supra n 9 at 80.

⁴⁸ Greeks talked of men not women, so sometimes in quotes the reference will be to men, because that is how the text was written. I mean to include both genders. I will refer to both genders in text, ie, sometimes I will say ‘he’, and other times I will say ‘she’, to show that I have both genders in contemplation throughout this piece of work.

⁴⁹ Heidegger, supra n 9 at 81.

⁵⁰ Rees, D A (ed) *Aristotle’s Nicomachean Ethics: A Commentary by the Late HH Joachim* (1970) 79.

⁵¹ Ibid.

⁵² Ibid.

[t]o know what a good shoe is and how to make it is comparatively a mere superficial knowledge: but to know what the right ideals in life are, and how to secure them – this is a knowledge which is, so to say, the whole character of the man.⁵³

Aristotle sees the just person as:

[doing] what is just from a settled purpose, whose formation presupposes a long training in acting rightly, and the kind of knowledge which involves a development of the whole character of the man.⁵⁴

Here, an analogy may be drawn between Aristotle’s ‘just person’ and the judge, whose training in legal knowledge and acting rightly reflects on and shapes (by way of legal proclamations) the development of the character of men and women in society. It is my assertion that judges should be *technites*; that is, they should be artists. Judges’ goodness *qua* judges will be determined by the goodness of their craft.

The *New Penguin English Dictionary* defines the word ‘good’ as something which is “deserving of respect, honourable, [and] well-founded; true”.⁵⁵ Thus, we can see that the good is also a form of the true. For present purposes, the ‘good’ in a work is the showing of that which is true, the Idea. As it will be shown, the Idea in law equates to the natural law concepts of equity and justice. Good case law is that which discloses the truth or Idea in its openness, so that we may ‘know’ the Idea itself. A judge is a craftsman if his or her judgments can be called ‘good’.

To recapitulate, an art-work is a creation or thing, which functions to disclose the Being of beings. The ontological disclosure that art produces for us, with respect to the unconcealment or uncovering of ourselves (our knowledge) as beings in the world, is what we may term simply as ‘truth’ or *aletheia*. Art discloses or uncovers the Idea of what is represented in the work.

⁵³ Ibid, 79-80.

⁵⁴ Ibid, 79.

⁵⁵ I have chosen a common-place and easily accessible dictionary to define ‘good’ for the same reason as set out *supra* n 5.

I.III Art's Action

How does art disclose truth? Art functions to disclose truth because “all art is *mimesis*.”⁵⁶ Or, put the other way around, “*mimesis* is the essence of all art.”⁵⁷ Plato states, in Book X of *The Republic*, that the essence of *mimesis* is imitation.⁵⁸ Aristotle believes that, because all art-forms are *mimesis*, or imitation, the only difference between them is the means each art-form employs to do the imitating.⁵⁹

The word *mimesis* means not only imitation, but also recognition of that which is imitated. Put another way, the word *mimesis* allows “something [to] be there [for us] without trying to do anything more with it.”⁶⁰ For Aristotle, *mimesis* is “a representation in which we ‘know’ and have in view the essential content of what is represented.”⁶¹

Hans-Georg Gadamer states that *mimesis* “implies that something is represented in such a way that it is actually present in sensuous abundance.”⁶² In the traditional Greek sense, “the [concept of] *mimesis* is derived from the star-dance of the heavens”⁶³ with the stars representing pure mathematical regularities that make up the heavenly order.⁶⁴

⁵⁶ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 169.

⁵⁷ Ibid, 186.

⁵⁸ Ibid, 169.

⁵⁹ Aristotle *Poetics* (trans) McLeish, K (1998) 4.

⁶⁰ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 119.

⁶¹ Ibid.

⁶² Gadamer, supra n 60 at 36. I will explain ‘sensuous abundance’ infra in text. For now, the term can be read in light of the natural and plain meaning of its words.

⁶³ Ibid.

⁶⁴ Ibid.

In *The Will to Power as Art*,⁶⁵ Heidegger explains that *mimesis* is the “basic representation the Greeks entertained concerning beings as such, their understanding of Being.”⁶⁶ He reasons:

[that] [s]ince the question of truth is sister to that of Being, the Greek concept of truth serves as the basis of the interpretation of art as *mimesis*.⁶⁷

Pythagoras also teaches that “things are really imitations”.⁶⁸ Aristotle speaks of imitation as deriving from the fact that:

[the] universe itself, the vault of the heavens, and the tonal harmonies that we hear, can all be represented in a miraculous way by numerical ratios...*Mimesis* reveals the miracle of order that we call the *kosmos*.⁶⁹

Gadamer believes that the Greek idea of *mimesis* as “imitation and recognition in imitation”,⁷⁰ is “broad enough to help us understand the phenomenon of modern art more effectively.”⁷¹ Both Gadamer and Pythagoras appear to view the concept of truth as the truth of Being in the cosmic sense. We derive from *physis* and the *techne* we craft is *mimesis*, that is, it is representation of beings as Being (or, the truth of being) in light of the order of the universe itself.

For Pythagoras, the establishing of ‘pure numbers’ through the presencing of imitation in art directly relates to:

[the] miraculous order visible in the heavens above, where, apart from the irregular motion of the planets, which do not seem to describe a perfect circle around the earth, the same pattern constantly recurs.⁷²

⁶⁵ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979).

⁶⁶ Ibid, 169.

⁶⁷ Ibid.

⁶⁸ Gadamer, supra n 60 at 101.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

In addition, Pythagoras believes that, alongside the order of the heavens there also exists the order of the soul (or Being).⁷³ Circularly, Xenocrates defines the human soul as:

the movement of the heavens; or better, it is the sequence of numbers which is forever unfolding itself in the heavens and closing itself together again: the repetitive sequence [of order]⁷⁴

Whereas, Aristotle believes that the soul's experiences are likenesses of things.⁷⁵ Poetic statements are incantations, rituals of the soul, which dissolve all conceptual and physical distance.⁷⁶ Socrates also sees the soul as belonging to "the realm of true Being."⁷⁷

In his *Phaedrus*,⁷⁸ Plato vividly describes a procession of souls that race their chariots to the "vault of the heavens",⁷⁹ following chariots driven by the Olympian gods. It is "[a]t the vault of the heavens, [that] the true world is revealed to view."⁸⁰ Plato considers it is our attachment to the "earthly burden of the sensuous life of the body"⁸¹ that disconnects us in daily life from the knowledge inherent in the divine cosmos. We need a guide to show us the way home, and art does the job of winged chariots for us; it represents the cosmic order, the truth of our Being.

Gadamer believes that "in place of the disorder and inconstancy that characterise our so-called experience of the world down here on earth",⁸² we may know in art the "true constant and unchanging patterns of being."⁸³

⁷³ Ibid.

⁷⁴ Gadamer, H G *Dialogue and Dialectic: Eight Hermeneutical Studies on Plato* (trans) Smith, P (1980) 141-142. Gadamer discusses Xenocrates's definition of the soul in Plato's *Philebus* (trans) Gosling, J (1975).

⁷⁵ Hegel, G W F *Aesthetics Lectures on Fine Art* (trans) Knox T M (1975) 257.

⁷⁶ Gadamer, supra n 60 at 162.

⁷⁷ Gadamer, supra n 74 at 28.

⁷⁸ Plato *Symposium and Phaedrus* (trans) Griffith, T (1986).

⁷⁹ Gadamer, supra n 60 at 14.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid, 14-15.

⁸³ Ibid.

Gadamer interprets the differing forms of order all relating to the *mimesis* of number as being significant because “the numbers and the pure relationships among them constitute the very *nature* of these manifestations of order.”⁸⁴ Put another way, there is numerical order at work in all of our *technes*, because all art is *mimesis*. Gadamer believes that all order in life, of the kind that beings create as well as in nature, depends on the continuing order of the cosmos.⁸⁵ This premise would logically include legal order. Indeed, law is defined in one dictionary as being “a statement of an order or relation of natural phenomena, a necessary relation between mathematical or logical expressions”.⁸⁶ Thus, art is required in law to disclose legal truth in the sensuous realm, just as art is required in life to disclose Being.

Gadamer’s view is that we experience order in art of every kind, for “[e]very work of art...resembles a thing...insofar as its existence illuminates and testifies to order as a whole.”⁸⁷ Moreover, he says:

[that] there is in every work of art an ever new and powerful testimony to a spiritual energy that generates order.⁸⁸

The Pythagorean view is that:

[the] periodic cycle of the year and of the months, the alternation of day and night, provide the most reliable constants for the [human] experience of order⁸⁹.

Gadamer adds that these experiences of order “stand in marked contrast with the ambiguity and instability of human affairs”.⁹⁰ One could argue that it is the inherent instability of human affairs that presents us with the *need* to create art, so that we may create order (by representing cosmic order) in the world.

⁸⁴ Ibid, 101. Emphasis added.

⁸⁵ Ibid, 102.

⁸⁶ Allen, R (ed) *The New Penguin English Dictionary* (2000).

⁸⁷ Gadamer, supra n 60 at 103.

⁸⁸ Ibid.

⁸⁹ Ibid, 14.

⁹⁰ Ibid.

As to the practical function of the cosmos, Plato's view is:

[that] the constant order of motions in the heavens of our universe, though always selfsame, nevertheless brings about the manifold phenomena and processes which keep the world we know in motion.⁹¹

For Gadamer, the work of art exemplifies a universal characteristic of human existence: the desire to build a world. He says:

[that] [i]n the midst of a world in which everything familiar is dissolving, the work of art stands as a pledge of order.⁹²

In fact, he states:

[that we] must always order anew what threatens to dissolve before us. This is what the productive activity of the artist and our own experience of art reveals in an exemplary fashion.⁹³

To be clear, *mimesis* does not merely refer to the original idea of something as being other than the art itself, rather mimesis means that the idea *is* there in the work, it presents itself *as* itself. This is the true meaning of imitation or representation in the Greek sense.⁹⁴ *Mimetic* imitation is a 'true' showing, as a showing of what is there.⁹⁵ Whereas, the 'good' refers to the work itself if the work is also a mimetic imitation of the cosmic order (ie, the true).

Gadamer defines the word 'showing' as meaning that the one to whom the thing is shown sees it accurately for him or herself.⁹⁶ To show something means to bring it into the light, and to let that which has come into the light be clearly perceived.⁹⁷

In every work that succeeds in speaking to us, there prevails a 'showing' – the

⁹¹ Gadamer, supra n 74 at 145. Gadamer discusses Plato's *Timaeus* (trans) Lee, H (1965).

⁹² Gadamer, supra n 60 at 104.

⁹³ Ibid.

⁹⁴ Gadamer, supra n 60 at 128.

⁹⁵ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 129.

⁹⁶ Ibid, 128-129.

⁹⁷ Heidegger, M *On the Way to Language* (trans) Hertz, P D (1971) 115.

work shows itself to us. As showing literally makes something come to light for us, we are able to properly perceive and examine its essence.⁹⁸

Heidegger calls showing Saying.⁹⁹ Showing brings to light what is present in a work, and fade from sight that which is absent. All radiant appearance of the truth of a work is grounded in the work's showing or Saying.¹⁰⁰ Heidegger believes that Saying "sets all present beings free into their given presence, and brings what is absent into their absence."¹⁰¹ Put another way:

Saying is the gathering that joins all appearance in manifold showing which everywhere lets all that is shown abide within itself.¹⁰²

Heidegger observes:

[that] [l]anguage has been called 'the house of Being'. It is the keeper of being present, in that its coming to light remains entrusted to the appropriating show of Saying. Language is the house of Being because language, as Saying, is the mode of Appropriation.¹⁰³

In Heidegger's philosophy, the driving force in the showing of Saying is Owing. Owing allows beings to come into their own "from where they show themselves in what they are, and where they abide according to their kind."¹⁰⁴ The Owing that brings beings to a place of openness, and which drives Saying as showing, Heidegger calls Appropriation. Appropriation "yields the opening of the clearing in which present beings can persist."¹⁰⁵

Appropriation cannot be understood either as an occurrence or a happening, rather it is something that can only be experienced. Appropriation is the gift of Saying,

⁹⁸ Ibid.

⁹⁹ Ibid, 126.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid, 135.

¹⁰⁴ Ibid, 127.

¹⁰⁵ Ibid.

but it is not an outcome.¹⁰⁶ Appropriation is the gift that gives beings a ‘there is’, “a ‘there is’ of which even Being itself stands in need to come into its own presence.”¹⁰⁷ Appropriation grants to us our place in nature, so that we may be capable of being those who speak (ie, show).¹⁰⁸

Further, Heidegger talks of the neighbourhood between poetry and thinking, and by poetry he means all art-forms.¹⁰⁹ Neighbourhood, for Heidegger, means simply dwelling in nearness. As poetry and thinking are both modes of saying, the nearness brings the two together into the neighbourhood of his Saying.¹¹⁰

Interestingly, the phrase ‘to say’ is semantically linked to the Old Norse word ‘*saga*’, which means to show, to make appear or to set free.¹¹¹ Another way to make something appear or to set it free is “to offer and [to] extend what we call World”,¹¹² which then lights up a space in the work in which the truth can appear.

The German words *anschauen* (to intuit) and *schauen* (to look upon), both relate to the English word *show*.¹¹³ These words are also connected with the German word for the beautiful, which is *das Schone*. *Anschauen* refers to the sphere of the visible, but with a particular view toward what is there to be seen.¹¹⁴ Gadamer says that the word *anschauen* was first used to describe the mystic’s vision of God. As can be seen from the use of these words, there is a very temporal element of dwelling contemplated in the act of showing.¹¹⁵

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, 128.

¹⁰⁹ In particular, see Heidegger, M *On the Way to Language* (trans) Hertz, P D (1971) 93.

¹¹⁰ Heidegger, supra n 97 at 93.

¹¹¹ Ibid, 93.

¹¹² Ibid.

¹¹³ Gadamer, supra n 95 at 158.

¹¹⁴ Ibid.

¹¹⁵ Ibid, 159.

Further, Gadamer calls art *welt-anschauung*, which can be related back to *anschauen* (to intuit), and which means literally “an intuition of the world.”¹¹⁶ He says that “the way in which we look upon the world, and upon our whole being-in-the-world, takes shape in art.”¹¹⁷

The concept of intuition, oriented as it is toward sense perception, may be extended to include conceptual knowledge. Thus, we may treat intuition as “intellectual intuition”.¹¹⁸

Edmund Husserl¹¹⁹ calls intellectual intuition “bodily givenness”,¹²⁰ and by this he means “the intuitive fulfilment of an intention.”¹²¹ For Gadamer, however, intuition is “an abstraction from the mediations through which human orientation in the world is achieved.”¹²² Either way, intuition is said to mediate between the ideal and the real, between the Idea and our given reality.

Gadamer argues that:

[it is] not the immediacy of sensible givenness that provides the basis of all the arts, but rather what Kant calls the ‘representation of the imagination’, the formative process of intuition together with the resulting formed intuition. The object of aesthetics as the theory of art would then be appropriately called *cognitio imaginativa*. For even in aesthetics, it is a question of a kind of cognition.¹²³

In his *Critique of Pure Reason*,¹²⁴ Immanuel Kant’s concept of intuition forms an important alliance with the concept of ‘concept’ itself. According to Kant, something can be given to beings, being as we are ‘finite’, only through the

¹¹⁶ Ibid, 164.

¹¹⁷ Ibid.

¹¹⁸ Ibid, 160.

¹¹⁹ Edmund Husserl is known as the founder of phenomenology.

¹²⁰ Gadamer, supra n 95 at 160.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Gadamer, supra n 95 at 160-161.

¹²⁴ Kant, I *Critique of Pure Reason* (trans) Meiklejohn, J (1959).

phenomena of space and time, which are for him the “forms of intuition”.¹²⁵ Gadamer says that Kant’s doctrine lends legitimacy to the concept of ‘intellectual intuition’ that his successors developed as an essential dimension of aesthetics.¹²⁶ Intellectual intuition is an important feature of “the ‘infinite intellect’ that is not granted to human beings.”¹²⁷ For Kant, the infinite intellect ‘sees into’ being itself.¹²⁸ Put in Heideggerian terms, intuition is an active ‘seeing into’ the Beingness of beings. Kant considers that “concepts without intuition are empty and incapable of yielding knowledge.”¹²⁹

In the *Critique of Pure Reason*, Kant defines the place and function of intuition:

Psychologists have hitherto failed to realise that imagination is a necessary ingredient of perception itself. This is due partly to the fact that this faculty has been limited to reproduction, partly to the belief that the senses not only supply impressions, but also combine them so as to generate images of objects. For that purpose, something more than the mere receptivity of impressions is undoubtedly required, namely, a function for the synthesis of them.¹³⁰

Gadamer says that insight “always involves an escape from something that had deceived us and held us captive.”¹³¹ Thus, through insight we must always gain a certain amount of knowledge. Insight enriches our experiences, and it is part of our essential nature as beings to exercise this intuitive and intellectual function.¹³²

In *The Relevance of the Beautiful and Other Essays*,¹³³ Gadamer discusses the concepts of intuition and vividness in the same breath because, for him, intuition is an aesthetic concept, not an epistemological one. In this way, intuition is related to the wider realm of imagination.¹³⁴ He says that:

¹²⁵ Gadamer, supra n 95 at 157.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Kant, I *Critique of Pure Reason* (trans) Meiklejohn, J (1959) 169.

¹³¹ Gadamer, H G *Truth and Method* (1979) 320.

¹³² Ibid.

¹³³ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986).

¹³⁴ Ibid, 158.

[it is] in the use of language, in rhetoric and literature, that the concept ‘vivid’ is truly at home: namely, as a special quality of description and narration such that we see ‘before us’, so to speak, what is not as such seen, but is only told.¹³⁵

Vividness may be best described as the “authentic presence of that which is narrated: ‘we literally see it before us’.”¹³⁶ In order to see something before us, we need imagination to bring that ‘presencing’ about, hence the close relationship between imagination and intuition.¹³⁷

Art arouses our intuition and imagination, and in this way it can establish itself in its own right and make of itself a ‘work’.¹³⁸ Gadamer refers to “the free play of imagination”,¹³⁹ and says that it should be purposeful in presenting the “given concept”¹⁴⁰ in a work.

Thus, a work of art does not merely blend into life’s context as something decorative, rather it ‘stands out’ in its own right. Art presents itself as something provocative; it does not necessarily please us, but it makes us dwell upon its essence. As Gadamer says, art elevates us into the realm of the super-sensuous, using beauty as its vehicle and inviting us to engage intuitively with its message.¹⁴¹

Art is *techne* or knowledge in the Greek sense of the word *aletheia*, which also means openness. In the openness of art, the eternal and permanent Idea of its essence is disclosed. The function of art is to reveal the truth. The revealing of art’s essence or truth comes about because all art is *mimesis*, or the imitation of the cosmic order, and in this way may equally be said to represent the logic of the legal order. Art presences for us in the sensuous realm, where we experience the

¹³⁵ Ibid.

¹³⁶ Ibid, 162.

¹³⁷ Ibid, 162-163.

¹³⁸ Ibid, 163.

¹³⁹ Ibid.

¹⁴⁰ Ibid, 164.

¹⁴¹ Ibid, 168.

absolute and unchangeable essence of a work in its presencing. It is the soul that sees the true, through its intuitive intellect.

Having set out art's function in the world, and having touched on the concept of truth, as it relates to *mimesis*, I will now elaborate on the concept of truth and attempt to show how truth manifests itself in a work.

LIV Truth, Idea and Being

In a work of art, the truth of an entity “set[s] itself into work”.¹⁴² According to Heidegger, to ‘set’ means to bring to a stand. A particular entity represented in an art-work comes through the work to “stand in the light of its being.”¹⁴³ In describing the truth of an art-work, Heidegger uses the example of a van Gogh painting, depicting a pair of peasant shoes.¹⁴⁴ He explains that the painting, as art, discloses what the pair of peasant shoes *is* in truth. The pair of shoes thus emerges into “the unconcealedness of its being.”¹⁴⁵ If there occurs in a work the disclosure of the what and the how an object (or subject) *is*, then there is here “an occurring, a happening of truth at work.”¹⁴⁶

Heidegger describes poetry (which is a literary art-form) as “the saying of the unconcealedness of what is.”¹⁴⁷ When Heidegger says that ‘un-concealment’ is the openness of beings, he means un-concealment in the Greek sense of *aletheia*.¹⁴⁸ As we know, another word for both un-concealment and *aletheia* is truth. The opposite of the openness of beings (ie, Being) is *lethe*, which is the Greek word for concealment.¹⁴⁹

¹⁴² Heidegger, M *Poetry, Language and Thought* (trans) Hofstadter A (1971) 86.

¹⁴³ *Ibid*, 36.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*, 74.

¹⁴⁸ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 68.

¹⁴⁹ Bernasconi, R *The Question of Language in Heidegger's History of Being* (1985) 15.

Gadamer explains that, traditionally, the expression *aletheia* was used in connection with speech; in particular, with words concerned with speech.¹⁵⁰ Thus, the concepts of *aletheia* and *lethe* relate aptly to judicial pronouncements, and to the law in general.

Heidegger explains that the Greek word *lethe* also means ‘to forget’ – however, it is not in the sense of psychological forgetting. *Lethe* means forgetting in a metaphysical sense, in the sense that “[t]he majority of men sink into oblivion of Being.”¹⁵¹ He believes we sink into oblivion because we only concern ourselves with the temporal, and that the things that dwell there are not beings as such, but only *ha nym einai phamen* or “of which we now say that they are”.¹⁵² What genuinely matters to beings, and makes a claim on us in a metaphysical sense, can only be *homoionoma* or something that brings us closer to Being.¹⁵³ Nietzsche says many do not emerge from this oblivion because they do not recognise the appearance of Being when they see it. Yet, even the most fleeting recognition of Being in art is capable of making beings remember their essence.¹⁵⁴

What Heidegger calls “the view upon Being”¹⁵⁵ belongs to all beings as their most inherently valuable possession. Because of our oblivion, and our loss of connection with Being, the view upon Being is “one which can be quite easily disturbed and deformed, and which therefore must always be recovered anew.”¹⁵⁶

Heidegger believes that the Greek view of truth as *aletheia* “comes under the yoke of”¹⁵⁷ Plato’s concept of the Idea. They are interconnected so that it would be telling half the story to speak of truth without speaking of the super-sensuous Idea,

¹⁵⁰ Gadamer, supra n 133 at 107.

¹⁵¹ Heidegger, supra n 148 at 194.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid, 194 -195.

¹⁵⁷ Petruzzi, P “Rereading Plato’s Rhetoric” (1996) 15 Rhetoric Review 5, 7.

and vice versa.¹⁵⁸ Heidegger observes that, for Plato, *aletheia* also means ‘non-distortion’. He says that we must understand the fundamental concept of *aletheia* well, in order to properly grasp the ancient Greek view of the relation of *mimesis* to truth.¹⁵⁹

The absolute Idea may also be called the ‘absolute spirit’. The universal or absolute spirit is what determines what is there in a work. The absolute spirit determines what is ‘true’, and it does so from within itself.¹⁶⁰

As mentioned above, it is in *The Republic* that Plato explains the concept of the Idea in art. Socrates describes the difference between the many representations of a thing that are available to an artist or craftsperson, and the one Idea which is always represented in each, regardless of its form.¹⁶¹ Socrates says that God created “only one real bed-in-itself in nature”,¹⁶² and that while representations may differ each artist still represents God’s one bed, or the one true Idea of bed.¹⁶³

Socrates then turns his proposition into a negative form, for clarity, by way of the following example:

What I mean is this. If you look at a bed, or anything else, sideways or endways or from some other angle, does it make any difference to the bed? Isn’t it merely that it *looks* different, without *being* different? And similarly with other things.¹⁶⁴

For Plato, the real bed – the Idea bed - represents the object of knowledge, and not the creative form, which is merely an object of opinion.¹⁶⁵ Plato uses the term

¹⁵⁸ Ibid.

¹⁵⁹ Heidegger, supra n 148 at 182.

¹⁶⁰ Hegel, G W F *Aesthetics Lectures on Fine Art* (trans) Knox T M (1975) 92.

¹⁶¹ Plato *The Republic* (2nd ed) (eds) Jones, C A and Radice, B (trans) Lee, D (1974) Book X.

¹⁶² Ibid, 424.

¹⁶³ Ibid, 425.

¹⁶⁴ Ibid, 426.

¹⁶⁵ Vlastos, G “A Metaphysical Paradox” in *Proceedings and Addresses of the American Philosophical Association* (1965-1966) 5, 16.

Form to refer to the Idea of bed. One author believes that in doing so, Plato puts Form in the place of God.¹⁶⁶

We have mentioned that for Plato, the super-sensuous is the Idea, that is, it is the true world (as opposed to the sensuous, which is viewed merely as the world of appearances). Fundamental to Plato's philosophy is his view that the world of the Idea equates to the essence of Being. According to Plato, the Being inherent in beings is the true being, or quite simply the 'true'.¹⁶⁷ Heidegger discusses Plato's view in *The Will to Power as Art*, and states that even though Plato's philosophy on Being and the Idea looks simple, it is magnificent because it enables every being to become "present to itself."¹⁶⁸

Being is named, too, with the metaphysical concept of *dike*. The Greek word *dike* is properly translated as 'justice', and may be described as a metaphysical concept, as opposed to one of morality.¹⁶⁹ Knowledge of this concept – *dike* – equates to knowledge of "articulating laws of the Being of beings."¹⁷⁰ *Dike* "names Being with reference to the essentially appropriate articulation of all beings."¹⁷¹ We can see, then, an ancient connection between truth and justice (ie, law).

All knowledge is committed to beings that appear in the light of Being under their own power. According to Plato, though, Being itself becomes subsumed in the 'Idea' itself. The Idea constitutes the Being of beings, and therefore is itself the true Being, or the true.¹⁷²

In Western thought, knowledge most often means not merely descriptive knowledge of what exists in form, but also knowledge of values, of 'right living' and 'right acting'. Knowledge includes knowledge of "how to live, what to do,

¹⁶⁶ Ibid, 15.

¹⁶⁷ Heidegger, supra n 148 at 166.

¹⁶⁸ Ibid, 204.

¹⁶⁹ Ibid, 166.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

which forms of life are the best and worthiest, and why.”¹⁷³ The English word knowledge stems from *knowlechen*, which means ‘to acknowledge’.¹⁷⁴ Thus, as we pointed out in the context of *mimesis* above, when we know something, we are acknowledging that which is there, that which exists in its own form.

Aristotle believes that, while we can learn a *techne* or craft, we cannot learn ‘moral knowledge’, nor are we able to forget it. It is something that we already know on a deep level, but that takes remembrance or acknowledgement to reawaken.¹⁷⁵ He observes that we can only apply moral knowledge because we actually possess it. However, there is a contextual element to the application of knowledge. Aristotle says:

[that] [w]hat is right, for example, cannot be fully determined independently of the situation that requires a right action from me.¹⁷⁶

The Idea, or concept, is always applied in the context of reality. Of justice, Gadamer says:

[that] what is right is formulated in laws and [is] contained in the general rules of conduct that, although un-codified, can be very exactly determined and are generally binding. Thus the administration of justice is a particular task that requires both knowledge and skill.¹⁷⁷

We can see that the administration of justice is in fact a *techne*. Judges apply laws and rules to the specific facts of a case. However, Aristotle describes the judge’s form of *phronesis* (ie, prudence) as *dikastike phronesis*, and not *techne* (art).¹⁷⁸

Why is this?

For Aristotle, the situation of a craftsperson is quite different to someone who applies the law because with a work requiring craft, such as a table, she may need

¹⁷³ Berlin, I *The Crooked Timber of Humanity: Chapters in the History of Ideas* (ed) Murray, J (1990) 28.

¹⁷⁴ Allen, R (ed) *The New Penguin English Dictionary* (2000).

¹⁷⁵ Gadamer, H G *Truth and Method* (1979) 283.

¹⁷⁶ Ibid. Gadamer quotes Aristotle’s *Nicomachean Ethics* (trans) Rackham, H (1934) vi 6.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid, 284.

to adapt the design to suit the particular circumstances. However, the alteration made does not make the craftsman's knowledge of the Idea of what is to be made more perfect, rather, she just leaves out certain aspects in the creation.¹⁷⁹ Gadamer explains that “[w]hat we have here is the application of [the craftsman's] knowledge and the painful imperfection that is associated with it.”¹⁸⁰

In comparison, there will be times where a judge (as someone who applies the law) will have to refrain from applying the law in its totality, because to do so would not produce the ‘right’ outcome (ie, the equitable or just outcome) in the case to hand. In ‘holding back’ from applying the full force of the law, the judge is not diminishing it but, rather, finding law or form of application that better does justice in the situation.¹⁸¹ In this way, the judge still upholds the law, because of the need to do justice in the case. Aristotle calls this type of application of the law *epieikeia*, or equity. For him, “*epieikeia* is the correction of the law.”¹⁸² Aristotle believes that everything that is set down in law is in a necessary tension with the real world of action, in that it is conceptual and cannot contain within itself practical reality in all of its nuances. He believes that the law is imperfect, not because it is *itself* imperfect, but because:

in comparison with the ordered world of law, human reality is necessarily imperfect and hence does not allow of any simple application of the former.¹⁸³

For my part I do not see any difference in the application of the Idea between a craftsperson making a table and a judge applying the law. Both need to tailor the outcome of their work to suit the situation, but neither are modifying the Idea of their craft (ie, the table is still recognisable as a table, and the law is still recognisable as the law). The Idea presented in the work should not alter. For example, a judge may tailor the application of a particular principle to do justice in a particular case, but she still applies *that* right principle. The judge's underlying

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

reasoning may be equitable but, as I explain below, equity is for Aristotle part of the ‘natural law’, and it is because of those origins that equitable principles do not open themselves up to fundamental alteration. The right question for Aristotle to ask, in my view, is whether the judgment is truthful, ie, whether it shows the Idea of the law, the applied rule, as remaining true in itself.

Gadamer explains that Aristotle’s reasoning stems from his view that moral knowledge has no particular end in sight, rather it is concerned with right living generally.¹⁸⁴ Whereas technical knowledge, for Aristotle, has its ends in sight; it is a particular type of knowledge and serves particular ends in the world.¹⁸⁵ Gadamer says this of Aristotle’s view:

Where there is a *techne*, we must learn it and then we are able to find the right means. We see, however, that moral knowledge always requires [a] kind of self-deliberation.¹⁸⁶

So, for Aristotle, knowledge is viewed as an ideal, and is juxtaposed with *techne*, which is viewed as the real. In order to have knowledge, one must deliberate with oneself, but not so with technical knowledge.

Again, I do not make much of Aristotle’s distinction in the context of the law, because judges must do both things: apply the ideal to the real; and as craftsmen use their technical skills to create a judgment (*techne*). However, I agree that the *capacity* for morality, and the conceptualisation in a practical way of moral knowledge, cannot be learned. But, I do think the knowledge itself can be passed on through literature, speech and action. Judges, as arbiters between law and fact, and as between beings themselves, are in a position to pass on moral knowledge in the Aristotelian sense where they consider it appropriate and relevant. Knowledge of the ‘right means’ cannot be known in advance of any given situation, because

¹⁸⁴ Ibid, 286.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

all knowledge must be applied to be meaningful. It is in this final sense that I agree with Aristotle's view of knowledge.

For the Greeks, art's usefulness lies in the realm of making the Idea appear. Art allows something to make an appearance as what it is, that is, it allows the Being of what is to be present in its permanence. The Idea is simply the Being of all that is.¹⁸⁷ *Mimesis* allows Being to appear in pure presencing by representing the Idea in outward appearance or form.¹⁸⁸ In relation to the one Idea, Socrates in Plato's *Republic* says: "*eidōs gar pou ti hen hekaston eiothamen tithesthai peri hekasta tapolla, hois tauton onoma epipheromen.*"¹⁸⁹

In *The Will to Power as Art*, Heidegger translates Socrates' speech as meaning:

We are accustomed to posing to ourselves (letting lie before us) one *eidōs*, only one of such kind for each case, in relation to the cluster (*peri*) of those many things to which we ascribe the same name.¹⁹⁰

Heidegger tells us that, in the context of *The Republic*, *eidōs* does not mean 'concept' (although the passage would make equal sense with this translation), but rather the outward appearance of something. In its appearance, a thing does not become present in its particularity (that is, the thing is not seen as the individual item (*peri*)), rather it presences in the world as that which it *is*.¹⁹¹ And, as we have seen, that which comes into presence is Being or the Idea. As Heidegger explains, we connect with the knowledge of the Idea through the representation or imitation of what is in the work of art, because what art imitates (ie, shows) is the Idea itself.¹⁹²

¹⁸⁷ Heidegger, M "The Way Back into the Ground of Metaphysics" in Barrett, W and Aiken, H (eds) *Philosophy in the Twentieth Century* (Vol 3) (1962) 185.

¹⁸⁸ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 167.

¹⁸⁹ Plato *The Republic* (2nd ed) (eds) Jones, C A and Radice, B (trans) Lee, D (1974) 596.

¹⁹⁰ Heidegger, supra n 188 at 172.

¹⁹¹ Ibid.

¹⁹² Ibid.

Being is the Idea, as we have said, but to be clear there is another type of being for Heidegger, which may be called ‘being in the world’.¹⁹³ In light of the difference between Being and being, Heidegger says “[t]he ontological disclosure that an art-work functions to produce in respect to *a being* is ‘truth’”,¹⁹⁴ or Being. Hence, “[t]he art work opens up in its own way the Being of beings.”¹⁹⁵ Heidegger calls this opening up, or ‘clearing’, “the truth of beings”¹⁹⁶ (which we also know as *aletheia*). And, in the artwork itself, “the truth of what is has set itself to work.”¹⁹⁷ Art for Heidegger is subordinate (or, functional) in relation to the opening up of Being, or to the disclosing of Being in the unconcealed.¹⁹⁸

In *Philosophy in the Twentieth Century*,¹⁹⁹ Heidegger offers a variety of interpretations for what he means by ‘being’:

In whatever manner beings are interpreted – whether as spirit, after the fashion of spiritualism; or as matter and force, after the fashion of materialism; or as becoming and life, or idea, will, substance, subject, or *energeia*; or as the eternal recurrence of the same events – every time, beings as beings appear in the light of Being. Wherever metaphysics represents beings, Being has entered into the light. Being has arrived in a state of unconcealedness.²⁰⁰

Truth occurs in a work of art as what Heidegger calls the “lighting up (*Lichtung*)...of beings”.²⁰¹ Tautologically, truth is merely the nature of the true. Truth, as understood in the Greek manner, merely means non-distortion, or openness; namely “for the self-showing itself.”²⁰² Something that is made *is*, because the Idea lets it come to presence in its outward appearance, and lets it *be*

¹⁹³ Sallis, J (ed) *Heidegger and the Path of Thinking* (1970) 69.

¹⁹⁴ *Ibid.*, 68. Emphasis added.

¹⁹⁵ Heidegger, M *Poetry, Language and Thought* (trans) Hofstadter A (1971) 39.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ Heidegger, *supra* n 188 at 186.

¹⁹⁹ Barrett, W and Aiken, H (eds) *Philosophy in the Twentieth Century* (Vol 3) (1962).

²⁰⁰ *Ibid.*, 128.

²⁰¹ Sallis, *supra* n 193 at 72.

²⁰² Heidegger, *supra* n 188 at 182.

for us in the sensuous realm.²⁰³ A thing that is created *is* only to the extent that, in its appearing for us, Being radiates.²⁰⁴

As mentioned above, it is through the eyes of the soul and not through the body that beings experience the absolute essence of a thing.²⁰⁵ While our intellectual intuition ‘sees’ what is in the sensuous realm, the Idea itself dwells in the realm of the super-sensuous. Such sight apprehends what a matter is; that is, its Idea. Therefore:

knowledge must measure itself against the super-sensuous, the Idea; it must somehow bring forward what is not sensuously visible for a face-to-face encounter: it must put forward or present [Emphasis added].²⁰⁶

Gadamer says “[t]he soul belongs to the realm of true Being.”²⁰⁷ Pei has pointed out that language has long been thought of as “the outer manifestation of a people’s soul, and the creator of their pattern of thought.”²⁰⁸

Gadamer tells us that the word ‘soul’, in the context of truth and Being, must be conceptualised in the same way as the ancient Greeks know the concept to be; that is, ‘soul’ must be viewed as “expressing the essence of life.”²⁰⁹

Plato knows the soul to be “the invisible basis of the constancy and alteration in the cosmos”,²¹⁰ and in this way he uses the word soul as also meaning “the *knowing* soul.”²¹¹ Gadamer says that we can see this from the doctrine of the soul

²⁰³ Ibid, 176.

²⁰⁴ Ibid.

²⁰⁵ Ibid, 150.

²⁰⁶ Ibid.

²⁰⁷ Gadamer, H G *Dialogue and Dialectic: Eight Hermeneutical Studies on Plato* (trans) Smith, P (1980) 28.

²⁰⁸ Pei, M *The Voices of Man: The Meaning and Function of Language* (1964) 10-12.

²⁰⁹ Gadamer, supra n 207 at 142.

²¹⁰ Ibid, 144. Gadamer discusses Plato’s views on the soul.

²¹¹ Ibid.

set out in Plato's *Timaeus*,²¹² which demands that we view the soul as 'knowing'.²¹³

The essence of the true, ie truth, is a generic and universal concept that appears as its constant self in amongst a diverse range of inconstant things.²¹⁴ Essence itself is a universally valid phenomenon, because it "makes everything true be what it is".²¹⁵ The truth of essence has universal validity; put another way, this proposition may be linked back to Pythagoras' cosmos by saying that the truth of essence has cosmic (ie mathematical and scientific) validity. Truth, as Being, is universal. As with Plato's example of the bed-frames, there are many *techne* of bed-frames, but only one universal bed-frame, only one Idea of bed-frame. The true proposition belongs in the super-sensuous realm of the universal, and it is changeless in itself.

In fact, Descartes interprets truth as 'certitude'.²¹⁶ Put another way, "[t]ruth is the system of propositions which have an unconditional claim to be recognised as valid."²¹⁷ William James states that, while this view of truth is "absolutely true, of course",²¹⁸ it is also "absolutely insignificant",²¹⁹ because it means nothing without being placed in context. Truth must exist "for someone and for itself, as well as for the spirit in general too."²²⁰ The concept of truth, in order to be meaningful, must be dealt with pragmatically.²²¹

James argues that true ideas are those that we can "assimilate, validate, corroborate and verify",²²² and false ideas are those that we cannot. In order to meaningfully define truth, it must be 'known' as something, it must be able to be verified in the

²¹² Plato *Timaeus* (trans) Lee, H (1965).

²¹³ Gadamer, supra n 207 at 144.

²¹⁴ Heidegger, supra n 195 at 50.

²¹⁵ Heidegger, supra n 188 at 147. Emphasis added.

²¹⁶ *Ibid*, 149.

²¹⁷ *Ibid*.

²¹⁸ James, W "Pragmatism's Conception of Truth" in Barrett, W and Aiken, H (eds) *Philosophy in the Twentieth Century* (Vol 1) (1962) 204.

²¹⁹ *Ibid*.

²²⁰ Hegel, G W F *Aesthetics Lectures on Fine Art* (trans) Knox T M (1975) 8.

²²¹ James, supra n 218 at 204.

²²² *Ibid*, 194.

context of the entity being called ‘true’.²²³ According to our above discussion on knowledge and *techne*, to know something as true is merely to ‘remember’ that it is so; that is, to reconnect with the universal knowledge of the true, in the context of any given form.

According to Aristotle, there are two spheres of truth. The first is the sphere of the necessary and universal, the “eternal coherence of subjects and attributes”.²²⁴ Within the first sphere, he includes hard science, “in its most perfect and strictest form.”²²⁵ This is the truth of which we have been speaking. The second is what Aristotle calls “the sphere of changeable connexions”.²²⁶ These are seen as mere coincidences or conjunctions. It is the less strict, and more imperfect, forms of art, science, conduct that dwell here.²²⁷

Truth in the first of Aristotle’s spheres is “attained by demonstrative reasoning resting on immediate apprehension of unalterable laws, of immediately necessary complex facts.”²²⁸ Truth in sphere one is reasoned truth, which does not change form; that is, we know it to be “one and the same for all and always – at all times and in all places.”²²⁹ The principles of truth here are those that are both necessary and eternal.²³⁰

Truth in the second sphere is attained by “reflection, calculation, deliberation – reasoning, ...on probable grounds.”²³¹ Odd though it seems, this truth can be seen as a matter of fact, as reasoning of this nature involves consideration of what has happened, and apprehension of what is likely to happen in the future.²³² It is obvious that the reasoning and calculation Aristotle talks of in relation to the

²²³ Ibid.

²²⁴ Rees, D A (ed) *Aristotle’s Nicomachean Ethics: A Commentary by the Late HH Joachim* (1970) 169.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

second sphere of truth is employed for the most part in the philosophical sciences, such as law. Legal reasoning involves reasoning, deliberation, calculation, foresight and in many branches uses the concept of probability. However, for the purposes of our above definition of art, we are dealing here with Aristotle's first category of truth – the unalterable, universal and logical one. Here, we are more interested in the concept of truth as principle than his second concept of truth as philosophical reasoning, although the process of analogical reasoning is discussed below as part of the system of rules that support our system of laws.

For Plato, the process of *disclosing* truth is a rhetorical act, that is, it dwells in dialogue and interpretive rhetoric.²³³ Interpretive rhetoric is “the art or the process of leading oneself and others toward understanding.”²³⁴ Plato's dialogic approach to truth and rhetoric make it plain that while truth is universal, it is not static. Truth is a “dynamic process of continual and inter-subjective disclosure.”²³⁵

For Gadamer, the superiority of knowledge over “preconceived opinion consists in the fact that it is able to conceive of possibilities as possibilities.”²³⁶ Put another way, the quest for knowledge (as opposed to the knowledge itself) is dialectical. In his *Metaphysics*,²³⁷ Aristotle says that:

[dialectic] is the power to investigate contraries independently of the object, and to see whether one and the same science can be concerned with contraries.²³⁸

In *The Republic*, Socrates and Glaucon discuss the relationship between dialectic and knowledge in the context of the parable of the prisoners in the cave. Socrates asks him “can [people] ever acquire any of the knowledge we say they must have

²³³ Petruzzi, P “Rereading Plato's Rhetoric” (1996) 15 Rhetoric Review 23.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Gadamer, H G *Truth and Method* (1979) 328.

²³⁷ Aristotle *Metaphysics* (trans) Bostock, D (1994).

²³⁸ Aristotle *Metaphysics* (trans) Bostock, D (1994) 25.

if they can't argue logically?"²³⁹ Glaucon replies "no, they can't."²⁴⁰ Socrates explains:

When one tries to get at what each thing is in itself by the exercise of dialectic, relying on reason without any aid from the senses, and refuses to give up until one has grasped by pure thought what the good is in itself, one is at the summit of the intellectual realm, as the man who looked at the sun was of the visual realm.²⁴¹

Glaucon agrees. "And isn't this progress what we call dialectic?"²⁴² asks Socrates.

Glaucon again concurs.

Then, a while later Socrates talks about dialectic:

Dialectic, in fact, is the only procedure which proceeds by the destruction of assumptions to the very first principle, so as to give itself a firm base. When the eye of the mind gets really bogged down in a morass of ignorance, dialectic gently pulls it out and leads it up, using the studies we have described to help it in the process of conversion. These studies we have often, through force of habit, referred to as branches of *knowledge*, but we really need another term, to indicate a greater degree of clarity than opinion but a lesser degree than knowledge – we used the term "reason" earlier on.²⁴³

Further, Socrates says:

Then you agree that dialectic is the coping-stone that tops our educational system; it completes the course of studies and there is no other study that can rightly be placed above it.²⁴⁴

"I agree",²⁴⁵ says Glaucon.

Mastering the art of dialectic is not about winning every argument. Rather, the art of dialectic is the art of asking the right questions. Dialectic is fundamentally about

²³⁹ Plato *The Republic* (2nd ed) (eds) Jones, C A and Radice, B (trans) Lee, D (1974) 342.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid, 343.

²⁴³ Ibid, 344.

²⁴⁴ Ibid, 347.

²⁴⁵ Ibid, 347.

persistent questioning, with a view towards achieving openness.²⁴⁶ Gadamer treats the art of questioning as being the art of thinking.²⁴⁷

Dialectic is “the art of conducting a real conversation.”²⁴⁸ In order to conduct a conversation, one must allow oneself to be directed by the object of the conversation itself. One must thoughtfully consider the weight of another’s opinion, and this requires openness and the ability to think in a questioning manner. Dialectic is the art of ‘testing’ premises to make sure they are logically sound. Dialectic does not try to discover the weakness in what is said, but rather wills to bringing out its strength.²⁴⁹ As Gadamer explains:

It is not the art of arguing that is able to make a strong case out of a weak one, but the art of thinking that is able to strengthen what is said by referring to the object.²⁵⁰

Further, dialectic is the art of viewing things in their unity, that is, of working out the common meaning of concepts. We can see how dialectic may be contrasted with the rigid form of statement and opinion, each of which demand that the other see its point of view. As a result of dialectic’s process of “question and answer, giving and taking, talking at cross purposes and seeing each other’s point”,²⁵¹ communication between beings may properly occur.²⁵² For Gadamer, where people reach an understanding through dialogue, the communication then transforms into a ‘communion’, which is a happening “in which we do not remain what we were.”²⁵³ In this way, Gadamer’s concept of communion may be related to Hegel’s concept of experience discussed above. Gadamer believes:

²⁴⁶ Gadamer, *supra* n 236 at 330.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*, 331.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*, 341.

[C]onversation has a spirit of its own, and that the language used in it bears its own truth within it, ie that it reveals something which henceforth exists.²⁵⁴

In order to represent what exists, that which *is*, it makes sense that the thing itself must hold within it agreement with the actual Being. In the Middle Ages, such agreement was termed *adaequatio*.²⁵⁵ Aristotle speaks of *homoiosis* when referring to agreement with what is.²⁵⁶ Heidegger confirms this state of affairs when he says that “[a]greement with what *is* has long been taken to be the essence of truth.”²⁵⁷

We need art in order to remember what it is that we know, and in this way we ‘acknowledge’ the true. There is only one real Idea, but many representations or situations in which the Idea can show itself. We have seen that the Greek word *dike* names Being, and is also the word for justice. It would be fair to say, then, that there is an inherent relationship between truth and justice.

Moral knowledge is something that we know but cannot learn, rather we must be re-awakened to its existence in the universe by art. Truth (*aletheia*) is certain, yet dynamic, in that it always makes itself relevant in the changing and uncertain context of the sensuous. Dialectic, then, is the process of achieving openness and letting truth’s essence shine forth.

At this point, it is prudent to briefly elaborate on the way in which truth occurs for beings in the sensuous realm, and it is Heidegger’s theory of the World and the Open that provides a brief explanation in light of the happening of truth.

²⁵⁴ Ibid, 345.

²⁵⁵ Heidegger, M *Poetry, Language and Thought* (trans) Hofstader A (1971) 36.

²⁵⁶ Ibid.

²⁵⁷ Ibid, 36-37.

I.V The Happening of Truth

Heidegger believes that language in a work of art brings what *is* into, and holds it in, the 'Open'.²⁵⁸ He considers that the art-work "opens up...the Being of beings...ie, the truth of beings."²⁵⁹ Put another way, a work of art functions to establish 'World' for us, which in Heidegger's view is the ontological context for a work's *isness*. In Heideggerian terms, an art-work holds open the openness of the World (the context of the work itself).²⁶⁰ In the World, art (*mimesis*) is then free to show or represent to us its *is-ness* (its Idea, or truth).

Because a work is created by beings, it is created in the context of what Heidegger calls Earth, which is the place where beings "ground [their] dwelling in the world."²⁶¹ The Earth is fundamentally self-closing and sheltering. However, the work establishes World, setting itself into the Open and thereby shows its Idea.²⁶² Put simply, "World is the context of the dialectic of an art-work's truth."²⁶³

In Heidegger's view, the truth of an art-work contains an ironic quality. Truth in art is not merely ontological openness, but is also an openness that has been granted in a dialectical relationship with its opposite, untruth.²⁶⁴ So, for Heidegger, the truth of an art-work is not only the disclosure of Being, it is also a truthful disclosure that takes 'un-truth' into account. It is the strife of truth and untruth that produces the clearing or ontological openness in which the art-work stands and shows the truth of itself.²⁶⁵

Works of art do not fade into historical uselessness, because they 'stand' in their own light of Being in the World. Art 'stands written' as a saying because it brings

²⁵⁸ Ibid, 73.

²⁵⁹ Sallis, J (ed) *Heidegger and the Path of Thinking* (1970) 69.

²⁶⁰ Ibid.

²⁶¹ Heidegger, supra n 255 at 46.

²⁶² Ibid.

²⁶³ Sallis, supra n 259 at 71.

²⁶⁴ Ibid, 70.

²⁶⁵ Ibid.

forth its own presence.²⁶⁶ Art is the “‘setting to work’ of the ontological disclosure of beings...as well as the preservation of the disclosure.”²⁶⁷ Thus, art is “the creative preservation of truth in a work.”²⁶⁸ Art, then, is both the becoming and the happening of truth.²⁶⁹ Art results in the nihilation of ordinariness, and of all that is merely factual; art produces a ‘clearing’ (*Lichtung*).²⁷⁰

In a metaphysical sense, the word ‘existence’ means simply ‘being there’. The word refers to the actuality of anything that *is* in the world.²⁷¹ In Heidegger’s seminal work *Being and Time*²⁷² the term ‘existence’ is used to describe the being of beings.²⁷³ In this light, the essence of being can be seen as meaning ‘being in its openness’, where Being manifests itself in the ontological dialectic of concealed and unconcealed (of Earth and World).²⁷⁴ When Heidegger says that ‘being exists’, he means “the being whose Being is distinguished by the open-standing standing-in in the unconcealedness of Being, from Being, in Being.”²⁷⁵

The World exists in opposition to the Earth, and strives to surmount it. As the World is ‘self-opening’, it cannot co-exist with the Earth, which is self-closing and concealing. This opposition Heidegger calls ‘a striving’.²⁷⁶ However, he does not see their oppositional striving as one of discord, rather World and Earth interrelate to “raise each other into the self-assertion of their natures.”²⁷⁷ Allan Hutchinson considers:

²⁶⁶ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 114.

²⁶⁷ Sallis, supra n 259 at 70.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Heidegger, M “The Way Back into the Ground of Metaphysics” in Barrett, W and Aiken, H (eds) *Philosophy in the Twentieth Century* (Vol 3) (1962) 134.

²⁷² Heidegger, M *Being and Time* (trans) Macquarrie, J and Robinson, E (1967).

²⁷³ Heidegger, supra n 271 at 134.

²⁷⁴ Ibid.

²⁷⁵ Ibid, 135.

²⁷⁶ Heidegger, supra n 255 at 49.

²⁷⁷ Ibid.

[that] [t]o be in a state of tension is not aberrational or anomalous; it is the usual experience of life and tradition.²⁷⁸

For his part, Heidegger observes that the inherent conflict of World and Earth is the location of “all nearness and remoteness of the gods.”²⁷⁹ Heidegger has named the effect of this strife between World and Earth ‘rift-design’.²⁸⁰ Rift-design is:

the mark of createdness which is left by the truthful ontological disclosure: ‘Being-created discloses itself as a strife Being-established in a figure (*Gestalt*) through a rift-design’.²⁸¹

Thus, rift-design is a manifestation of bringing truth into the open. Art lets the truth of beings ‘happen’.²⁸² In Heidegger’s view, truth presences in a work by way of “the conflict between lighting and concealing in the opposition of World and Earth.”²⁸³

Put another way:

Truth establishes itself as a strife within a being that is to be brought forth only in such a way that the conflict opens up in this being, that is, this being is itself brought into the rift-design. The rift-design is the drawing together, into a unity, of sketch and basic design, breach and outline. Truth establishes itself in a being in such a way, indeed, that this being itself occupies the Open of truth.²⁸⁴

A work, by its nature of being a work of art, “makes space for...spaciousness.”²⁸⁵ I take the saying to mean that the work liberates itself into the Open and establishes itself as strife in its open structure. In this way, the work *qua* work sets up World, and then holds open the Open of the World.²⁸⁶ In the Open, truth (the Idea of a work) may shine forth.

²⁷⁸ Hutchinson, A *Evolution and the Common Law* (2005) 196-197.

²⁷⁹ Heidegger, *supra* n 255 at 74.

²⁸⁰ Heidegger, *supra* n 259 at 72.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ Heidegger, *supra* n 255 at 62.

²⁸⁴ *Ibid.*, 63.

²⁸⁵ *Ibid.*, 45.

²⁸⁶ *Ibid.*

Art functions to establish World, which is the ontological context for work's Being. World itself is the context of the dialectic of art's truth. It is the strife of truth and un-truth that presents the dialectical context in which the truth of art can appear. Art holds open the World so that the work's essence may become present. For Heidegger, art is created in the context of Earth, which is where beings ground their dwelling.

Before proceeding to examine *how* this truth makes itself known to us in the work (ie, by the work itself being beautiful and the effect of this on us as those who experience the work), I will clarify the tacit analogy made thus far between truth and Being as Idea and the law as Idea.

In particular, I will consider the context in which the judicial opinion is created, and I will consider the responsibilities judges have to reason by analogy under the doctrine of precedent (this is the 'rule' aspect to our definition of art). Ultimately, the following section aims to show that the legal conception of truth in a judgment, most often (but not always) set out in the *ratio* of the case, is analogous to the universal Idea of truth; that is, the Greek conception of Being in the universe.

Chapter II Truth and Law

II.1 Truth and the Judicial Context

One judicial commentator describes law as a “means of social control fostering social order in modern society.”²⁸⁷ Law fosters social order by recognising “certain basic underlying interests and provides a framework of rules for giving effect to them.”²⁸⁸ The *Law.com Dictionary* defines ‘law’ as:

²⁸⁷ Farrar, J *Introduction to Legal Method* (1977) 5.

²⁸⁸ *Ibid*, 6.

any system of regulations to govern the conduct of the people of a community, society or nation, in response to the need for regularity, consistency and justice based upon a collective human experience.²⁸⁹

It may further be said that the “law *communicates* and *reinforces* social values.”²⁹⁰ Put another way, the law can be understood as “a set of literary practices that...create new possibilities for meaning and action in life.”²⁹¹

Societies, and their norms and values, change and evolve. There are always new situations which “breed [their] own new needs and problems”,²⁹² and which place new demands on the law. For practical reasons, Parliament cannot be expected to lay down rules for all of the possible consequences of life. Or, as Berlin says, Parliament cannot possibly legislate for the “unknown consequences of consequences.”²⁹³ Adjudication is an essential connecting tool, between legal rules and principles themselves and the reality of life.²⁹⁴ The application of the law also expands and changes the law itself, because of the multitude of ways that factual matters come before the courts.

A legal problem may, by its very nature, be characterised in a rich variety of ways, and the judge is responsible for her use of language and ultimately for the resulting decision.²⁹⁵ As Edward Levi, a distinguished professor of law emeritus at the University of Chicago, states: it is “only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case.”²⁹⁶ As a court sometimes has to apply a piece of legislation in circumstances that Parliament could not have foreseen, the meaning given in interpreting that legislation must also be new.²⁹⁷ By the very nature of the plurality

²⁸⁹ “Law.com Dictionary” <<http://dictionary.law.com/>>

²⁹⁰ Farrar, supra n 287 at 6. Emphasis added.

²⁹¹ White, J B *Heracles' Bow: Essays on Rhetoric and Poetics of the Law* (1985) 107.

²⁹² Berlin, I *The Crooked Timber of Humanity: Chapters in the History of Ideas* (ed) Murray, J (1990) 14.

²⁹³ Ibid.

²⁹⁴ Horowitz, J *Law and Logic* (1972) 68.

²⁹⁵ White, supra n 291 at 123.

²⁹⁶ Levi, E H *An Introduction to Legal Reasoning* (1962) 6.

²⁹⁷ White, supra n 291 at 124.

and unpredictability of humans, judges necessarily have adjudicatory and applicatory discretion.²⁹⁸

Further, because adjudicative decision-making is context-dependent and because it is not possible to analyse the facts with total completeness or certainty, the exercise of judicial discretion is indispensable and will always be a characteristic of the common law.²⁹⁹ Bastarache points out that adjudication “concerns itself with more than legal theory”,³⁰⁰ it is also “guided by a search for the correct balance of all relevant factors.”³⁰¹

However, judges’ discretion is fettered to a large extent by the very system in which they adjudicate. The doctrine of precedent lays down rules about value, order and hierarchy within common law jurisdictions. In order for a judge’s decision to be legitimate within that system, she or he must follow the rules.³⁰² Being bound by rules means that, while judges have necessary discretion as adjudicators, that discretion (to make and to follow primary legal rulings) is also exercised within its own underlying system of rules and principles which judges are duty bound to follow.³⁰³

While it is understood that Parliament’s law is supreme, and the judges must apply it,³⁰⁴ judges have considerable discretion in interpreting the words of a statute and applying them to the facts. (Further, I would agree with the Realists that the facts *themselves* can come within the realm of judicial discretion.) As Sir Geoffrey Palmer states, “a statute means what the courts say it means”³⁰⁵; the executive

²⁹⁸ Hutchinson, *supra* n 278 196.

²⁹⁹ *Ibid.*

³⁰⁰ Bastarache, M “The Role of Academics and Legal Theory in Judicial Decision-Making” (1999) 37 *Alta LR* 739, 740.

³⁰¹ *Ibid.*

³⁰² Farrar, *supra* n 287 at 65.

³⁰³ Fletcher, G *Basic Concepts of Legal Thought* (1996) 55.

³⁰⁴ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

³⁰⁵ Palmer, M and Palmer, G *Bridled Power: New Zealand Government under MMP* (1997) 254.

function does not extend to its final interpretation or application, and this is as it should be according to our constitutional separation of powers.³⁰⁶

Palmer makes the comment that the judicial branch of government is the one most likely to be “reliable in its adherence to principle, neutrality, and rationality.”³⁰⁷

Neil MacCormick elaborates on Palmer’s thinking, when he says that because judges are required to weigh and balance competing factors:

it may take time for a line of decisions to emerge that deserve full respect as settled law. Statute law is less likely to be accurate, since the lawmaker has to get everything right all at once.³⁰⁸

The world in which judges work is often one where they are faced with choosing between equally ultimate ends and equally absolute claims.³⁰⁹ The judge knows that the realisation of some of these ends and claims must inevitably result in the sacrifice of others. The extent of a person’s liberty to choose how he or she lives must be weighed against a myriad of other social values - equality, fairness, justice, security, public order and happiness, to name a few.³¹⁰ As Isaiah Berlin says, there is in any society a “constant need to compensate, to reconcile, to balance.”³¹¹

Berlin uses the example of divergent goals in nature to illustrate his point:

Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted.³¹²

³⁰⁶ Ibid.

³⁰⁷ Ibid, 242.

³⁰⁸ MacCormick, N *Rhetoric and the Rule of Law: a Theory of Legal Reasoning* (2005) 273.

³⁰⁹ Dewey, J “Changed Conceptions of the Ideal and the Real” Barrett, W and Aiken, H (eds) *Philosophy in the Twentieth Century* (Vol 3) (1962) 239.

³¹⁰ Ibid, 240.

³¹¹ Dewey, supra n 309 at 240.

³¹² Berlin, supra n 292 at 12.

Equality for all, and liberty for most, sometimes demands the restraint of the liberty of a few. Without this restraint there would be no room for humanity in social life, or for justice and fairness to be administered. Berlin says “these collisions of values are of the essence of what they are and what we are.”³¹³

James Boyd White argues that the law:

should be responsive and responsible to the tradition of which it is a part, to the larger cultural community in which it takes place.³¹⁴

Judges are aware that tradition is not something static, but is dynamic and continually open to reinterpretation. Judges should progress the legal tradition by “combining heresy and heritage into fruitful tension.”³¹⁵ However, as Hutchinson states:

[W]hat is fruitful will itself be contingent and contested so that there is no settled or adequate combination that can claim to be authoritative by dint of its balance or fruitfulness. To be in a state of tension is not aberrational or anomalous; it is the usual experience of life and tradition.³¹⁶

Case law’s normative content, the application of its Idea, must be determined in relation to the unique factual matrix before the court.³¹⁷ White illustrates the plethora and variety of matters that come before the courts when he says:

[that][w]hatever is problematic in a contract, a statute, a regulation, or an administrative decision – indeed whatever is problematic in our collective life – is likely to end up in a judicial opinion.³¹⁸

In fulfilling their constitutional task of deciding cases, Hutchinson argues:

³¹³ Ibid, 13.

³¹⁴ White, supra n 291 at 125.

³¹⁵ Hutchinson, A *Evolution and the Common Law* (2005) 196.

³¹⁶ Ibid, 197.

³¹⁷ Gadamer, H G *Truth and Method* (1979) 291.

³¹⁸ White, J B *Heracles’ Bow: Essays on Rhetoric and Poetics of the Law* (1985) 110.

[that]judges must understand that there is not a two-step process of first understanding and then applying; the latter is part of the former because *we cannot understand in the abstract or general but only in concrete and particular situations* [Emphasis added].³¹⁹

For Gadamer:

judging the case involves not merely applying the universal principle according to which it is judged, but co-determining, supplementing, and correcting that principle.³²⁰

The aim is that a judicial opinion can be “understood at every moment, in every concrete situation, in new and different way.”³²¹

In *Truth and Method*,³²² Gadamer states his fundamental hermeneutical point as:

[T]he law is always deficient, not because it is imperfect in itself but because human reality is necessarily imperfect in comparison to the ordered world of law, and hence allows of no simple application of the law.³²³

Through the adjudication of interpretation, the common law should gain both constancy and growth.³²⁴ Arguably, the function of adjudication is to reach an equitable outcome for both parties by balancing and weighing their rights at law. In light of the court’s task, Herbert Lionel Adolphus Hart considers the essential judicial virtues to be:

impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be *demonstrated* that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice. In all this we have the ‘weighing’ and ‘balancing’ characteristic of the effort to do justice between competing interests.³²⁵

³¹⁹ Hutchinson, *supra* n 315 at 172.

³²⁰ *Ibid.* Hutchinson quotes Gadamer, H G *Truth and Method* (1979) 39.

³²¹ *Ibid.* Hutchinson quotes Gadamer, H G *Truth and Method* (1979) 309.

³²² Gadamer, H G *Truth and Method* (1979) 291.

³²³ Hutchinson, *supra* n 315 at 172. Hutchinson quotes Gadamer, H G *Truth and Method* (1979) 318.

³²⁴ *Ibid.*

³²⁵ Hart, H L A *The Concept of Law* (2nd ed) (1994) 205.

Ronald Dworkin considers that judges not only have a duty to follow the law and legal rules in place, they also have an obligation because of the discretion awarded them to act ethically and to apply sound moral practice.³²⁶ John Finnis believes that the nature of judicial duty *requires* judges to resort to moral argument.³²⁷ Where legislation and common law do not offer up equitable solutions on the particular facts of a case, judges are responsible for filling the gap and must be guided by a sense of fairness, equitableness and morally valid principles.³²⁸ Moral choice itself is “always a matter of compromise between competing goods rather than a choice between the absolutely right and the absolutely wrong.”³²⁹

For Dworkin, the purpose of the law is:

to lay principle over practice to show the best route to a better future, keeping the right faith with the past.³³⁰

As to the truth of law, Dworkin argues that legal propositions may be called true if:

they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community’s legal practice.³³¹

In contrast to Dworkin, Aristotle does not regard any system of laws as the ‘true law’ itself, rather he considers that the concept of equity (in broad terms) is the true law.³³² In a general sense, equity may be defined as “fairness in the resolution of disputes through the application of good conscience.”³³³ In *The Principles of Equitable Remedies*,³³⁴ Spry states:

³²⁶ Hutchinson, supra n 315 at 72. Hutchinson discusses Dworkin, R *Law’s Empire* (1986) 110 -114.

³²⁷ Finnis, J “The Truth in Legal Positivism” in George, R (ed) *The Autonomy of Law: Essays on Legal Positivism* (1996) 204.

³²⁸ Ibid.

³²⁹ Hutchinson, supra n 315 at 101.

³³⁰ Ibid, 72. Hutchinson discusses Dworkin, R *Law’s Empire* (1986) 132.

³³¹ Ibid. Hutchinson discusses Dworkin, R *Law’s Empire* (1986) 110.

³³² Gadamer, supra n 317 at 284.

³³³ Dal Pont, G and Chalmers, D *Equity and Trusts in Australia and New Zealand* (1996) 1.

³³⁴ Spry, I C *The Principles of Equitable Remedies* (4th ed) (1990).

Equitable principles have above all a distinctive ethical quality, reflecting as they do the prevention of unconscionable conduct. Further, they are of their nature of great width and elasticity and are capable of direct application...in new circumstances as they arise from time to time.³³⁵

In *Lord Dudley and Ward v Lady Dudley*,³³⁶ the Court made the following observation about the place of equity in the common law:

Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and *is a universal truth*; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtiles, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it [Emphasis added].³³⁷

Aristotle distinguishes between that which is ‘naturally’ lawful and that which is legally or procedurally lawful.³³⁸ The latter type of law may be called ‘positive law’, and Aristotle says that this type of law is subject to change and revision. Natural law, however, is an absolute concept, although he admits it may be applied in differing ways.³³⁹ For Aristotle:

[T]here are laws that are entirely a matter of mere agreement (eg traffic regulations) but there are also things that do not admit of regulation simply by human convention, because *the ‘nature of the thing’ constantly asserts itself. Thus it is quite legitimate to call such things ‘natural law’* [Emphasis added].³⁴⁰

For Aristotle, the concept of natural law has a critical function, but we are not able to apply it dogmatically, because all application is situational. In view of all human laws being imperfect, the inviolable concept of natural law becomes

³³⁵ Ibid, 1.

³³⁶ *Lord Dudley and Ward v Lady Dudley* (1705) Prec Ch 241.

³³⁷ Ibid, 119.

³³⁸ Gadamer, supra n 317 at 284.

³³⁹ Ibid, 285.

³⁴⁰ Ibid. Gadamer discusses Aristotle’s view of natural law.

indispensable.³⁴¹ Aristotle believes that the *idea* of what is equitable is what first created the system of law.³⁴² He equates natural law with “the nature of the thing”,³⁴³ and says that the nature of a thing must be determined on a case by case basis by application and by the use of our inherent moral consciousness.³⁴⁴

Plato writes about justice in a more absolute sense than does Aristotle. Aristotle appears to focus more on the application of natural law, while Plato focuses more on the absoluteness of the nature of the Idea. Plato believes:

Accepting the existence of a realm, an order universal, harmonious and just, the wise man will draw upon this to present the ideal of a just political community for which he will formulate just laws which in his capacity as a judge he will be able to apply in an unequivocal way, without giving rise to criticism or controversy.³⁴⁵

Aristotle’s application of the true, universal order, is what he calls “practical wisdom”.³⁴⁶ When beings are faced with a problematic situation of their own creating, judges must seek out “on the basis of equity, a solution which is more just than that of the law”,³⁴⁷ and in order to do so must apply practical wisdom. Practical wisdom is related to *phronesis* or prudence, which itself is inherent in Roman *jurisprudencia*.³⁴⁸

By way of background, the ancient Greeks make no distinction between the physical laws of nature, which control the universal order, and the decrees of the gods, which determine societal order.³⁴⁹ Nature is entitled to be worshiped because it was given to us by the gods. Further, it is considered that there are inviolable

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid, 286.

³⁴⁴ Ibid.

³⁴⁵ Perelman, *C Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (1980) 88. Perelman discusses Plato’s view of justice.

³⁴⁶ Ibid, 89.

³⁴⁷ Ibid.

³⁴⁸ Ibid, 119.

³⁴⁹ Lloyd, *D The Idea of Law* (1973) 71.

laws (natural laws) that were also given by the gods as a gift to humanity.³⁵⁰ Aristotle considers natural law to be something that is “common to all mankind.”³⁵¹

In the latter part of the Middle Ages, Aristotle’s writings were re-discovered by the Catholic church, and incorporated into the scholastic philosophy of the time.³⁵² A main proponent of Aristotle’s natural law views is Saint Thomas Aquinas, who makes the distinction between:

divine law, which could be known only by revelation, and natural law, which was wholly rational and which could be understood and interpreted by the light of unaided human reason.³⁵³

Thus, Aquinas saw natural law (*ius naturale*) as being intrinsic to reason and, as such, universally applicable.³⁵⁴ There were positive laws that (if they were just) espoused natural laws, also, and those positive laws could be seen to relate directly back to the laws of nature (*reducuntur ad legem naturae*).³⁵⁵ Aquinas called those aspects of positive law having natural law bases *ius gentium*.³⁵⁶ It is arguable that the inclusion of natural law precepts into positive law assists them in gaining social legitimacy – ie, that sense of fairness and justice, along with the rules of procedural fairness and due process.³⁵⁷ Positive laws that incorporate or have as their normative base natural moral law are for Aquinas the “requirements of practical reasonableness.”³⁵⁸

³⁵⁰ Ibid, 73.

³⁵¹ Ibid, 75. Lloyd discusses Aristotle’s view of natural law.

³⁵² Ibid, 80.

³⁵³ Ibid.

³⁵⁴ Finnis, supra n 327 at 196. Finnis quotes Aquinas’s first major work: *Commentary on Peter Lombard’s ‘Positions’ (Commentum in Libros Sententiarum)* (c. 1255).

³⁵⁵ Ibid.

³⁵⁶ Ibid, 202.

³⁵⁷ Ibid, 204.

³⁵⁸ Ibid, 202.

To use Finnis's example, the positive rule that you should return any item that you have borrowed is based a natural law concept.³⁵⁹ However, there are times when it would be inequitable to apply this law, for example, where "the thing borrowed is a deadly weapon and the lender has turned into a maniac."³⁶⁰ Thus, the natural law would prevail in this case in the decision to not return the thing.³⁶¹ As we have seen, natural law equates to equity; it is the universal Idea of law. A 'good' judgment is one in which the 'true' shows itself.

Finnis observes:

[W]hile the *natural* precepts...are the same for all peoples, it is the variety of circumstances that causes the readily observable variety among *positive* laws [Emphasis added].³⁶²

We can see that natural law is intrinsic to reason and related to moral virtue. Natural law may be equated with the 'nature of a thing', or with its essence. The essence of a thing or matter, as we have seen above is its truth or Idea. It is a judge's moral consciousness, via practical reasoning, that enables equitable or natural laws to be laid down in unique factual situations. Natural law is for our purposes analogous to Plato's Idea of a thing, because natural law is 'there' in a way that our moral consciousness 'remembers' the right outcome and is able to assess the equity or justice of a situation.

As moral knowledge only needs to be 'remembered', it cannot be taught like a *techne* can be taught; rather knowledge or *aletheia* is the *outcome of mimesis*, which itself can be taught. Art as *mimesis* (that is, the judicial opinion as *mimesis*) imitates the real essence of a thing, thereby revealing the truth of a thing or of a matter in the Open.

³⁵⁹ Ibid, 196.

³⁶⁰ Ibid, 196.

³⁶¹ Ibid, 196.

³⁶² Ibid, 197.

The natural order of the cosmos may be equated with the continuing (rational) legal order. Art embodies the cosmic order, the Idea, the truth of a thing as equally in a judgment as in a painting. In the judgment, the Idea is the universal and constant natural law. Our moral knowledge is inherent in us as beings, but we need art in order to 'remember' that we have it and that we remain connected on a soul level to a knowledge of the star-dance of the heavens, reflecting the universal order.

We have seen that the law is applied and interpreted in context and, because of this, judges have discretionary power within our common law system of rules. Judges must weigh and balance relevant factors and come to a decision that is fair, rational and equitable. The court system needs procedural due process to give legitimacy to its findings, but it is the principle itself that is the authoritative law. The authoritative law may equally be termed 'natural law' in the Aristotlean sense. Natural law is analogous to the Idea and Being discussed above, because it is constant and universal, and because it equates to the essence of a thing.

Thus far, I have only provided a brief example to show the workings of natural law. The reason being that natural law or the Idea of the law, although constant, will manifest itself differently in different situations. However, I will elaborate further on the Idea of law in the duty of care cases analysed below.

Before analysing the duty of care principle for its consistency, I wish to elaborate on the procedural rules (mentioned above) that bind the courts in our common law system. One of the ingredients of our agreed definition of art is that the thing made conforms to a system of rules and principles. As mentioned in the introduction, the principles are what we are terming the legal truth, and this aspect has been discussed above (in theory). The rules aspect is what we will now briefly consider, again in theory, as the application of the system of rules and principles can only be examined in light of the cases themselves.

II.II Legal Systems in the Common Law

The case law that judges create necessarily brings out the tensions inherent in a legal statement of value. For example, ‘we all have the right to liberty’. Case law, or common law, gradually builds up a rich dicta around each statement of value, and in doing so firmly locates it in situational experience.³⁶³

Textual meaning shows itself in the “encounter between the text and its interpreter.”³⁶⁴ Thus, the hermeneutic task consists in bringing out the tension inherent between the legal text and its factual matrix.³⁶⁵ It is the judge’s role to bring this tension to the fore and to mediate it. This process may properly be called ‘dialectic’; that is, the process of judicial reasoning ought to involve thesis, antithesis and synthesis.³⁶⁶ Dialectic is a way of uncovering and resolving the tensions in a legal text, in order to create a new richness and aptness of meaning.³⁶⁷

Hutchinson believes it is important not to cover up the tension between the law and the facts, rather judges should aim to bring it to the fore. In bringing out the tension in a text, judges are in a better position to reason openly, questioningly and logically; that is, there is a greater opportunity for them to find and apply the ‘truth’ of the law.³⁶⁸ As Heidegger says, the truth of an art-work appears in the context of dialectic or World. This being the case, good judicial texts will be written so that there is an openness, a space between Saying and meaning that allows for both future application and revision, as well as continuation of the legal Idea in question.

For White, the standard by which a judicial opinion is measured for its excellence is the extent to which it recognises both sides of the argument and incorporates that

³⁶³ Hutchinson, *A Evolution and the Common Law* (2005) 172.

³⁶⁴ *Ibid*, 180.

³⁶⁵ *Ibid*. Hutchinson discusses Gadamer, H G *Truth and Method* (1979) 307.

³⁶⁶ Allen, R (ed) *The New Penguin English Dictionary* (2000). See definition of ‘dialectic’.

³⁶⁷ Hutchinson, *supra* n 363 at 132.

³⁶⁸ *Ibid*, 172.

recognition within itself.³⁶⁹ He says that “an opinion that simply adopted one side’s brief would not be worthy of the name.”³⁷⁰ Like White, Hutchinson believes it is important to bring into the open contradictions and tensions within the judicial text, so that they can be contextualised, reformulated and appropriated to progressive effect.³⁷¹

The skill of interpretation is necessary in order for the law to be useful to us, so that it may be applicable in a variety of differing situations. The work of interpretation is actually the work of application; interpretation and application cannot be meaningfully separated from one another.³⁷² While judges are free to be creative in applying/interpreting the law, they remain subject to the law in the same way as every other member of the community and are duty bound to act within the system’s rules in their professional role.³⁷³

The legitimacy of our legal system requires that a judge’s judgment is not based on arbitrary or unpredictable reasoning. Judges must have as a prime consideration the just weighing up of the relevant law as a whole.³⁷⁴ These controls and requirements allow for legal certainty, which is part of what gives the law its legitimacy. It ought to be possible to know in principle what the law says in any given situation. In this way, the legal order is valid for all people, and applies even-handedly to all people.³⁷⁵ Hence, the law is always speaking to us (Saying), and it remains both open and constant, even in the face of (necessary) situational revision.

In terms of legal interpretation, Gadamer states that the application of imagination (what he calls the ‘free-play of imagination’) ensures that “the gap [between the text and its application] can never be completely closed.”³⁷⁶ This free-play of

³⁶⁹ White, J B *Heracles’ Bow: Essays on Rhetoric and Poetics of the Law* (1985) 116.

³⁷⁰ Ibid.

³⁷¹ Hutchinson, supra n 363 at 196.

³⁷² Gadamer, H G *Truth and Method* (1979) 294.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ Hutchinson, supra n 363 at 172. Hutchinson discusses Gadamer, H G *Truth and Method* (1979) 384.

imagination works to establish an openness in which the law is able to constantly re-invent itself.³⁷⁷

White believes imagination to be an essential skill of the lawyer and the judge. For him, the activity of legal professionals is:

an enterprise whose central performance is the claim of meaning against the odds: the translation of the imagination into reality by the power of language.³⁷⁸

White views the art of law as a literary one, because it deals with and controls the use of language. Participation in such an art-form requires the use imagination.³⁷⁹

Yet, it is innovation which is the quality that most represents the common law tradition.³⁸⁰ Indeed, those cases that we know of as ‘important cases’ tend to change the legal tradition by revealing the Idea by way of new and innovative applications. Put another way, the Idea of law is revealed as universally applicable by ‘showing’ itself in variety of sensuous situations. The phrase ‘important cases’ is interchangeable with the phrase ‘good cases’ as both refer to the work itself showing the Idea of the law, or the true.

Judges who have mastered judicial reasoning and interpretation enable the past to be seen in a new light.³⁸¹ Not only is it possible to continue legal tradition by adapting it, but such “a judicial attitude and approach is in the very best traditions of the common law.”³⁸² Further, it is by examining the past that we can learn from it, and make beneficial changes for the future.³⁸³ In fact, it is arguable that interpretation and application are the *raison d’etre* of legal adjudication.³⁸⁴ However, the Idea of law should remain constant, it is just its shape that alters (like

³⁷⁷ Ibid. Hutchinson discusses Gadamer, H G *Truth and Method* (1979) 498.

³⁷⁸ White, J B *The Legal Imagination* (Abridged Edition) (1985) 208.

³⁷⁹ Ibid.

³⁸⁰ Hutchinson, supra n 363 at 189.

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid, 196.

Plato's Idea of table). Just because a particular judgment has been accepted over time, does not mean that it is clear or certain.³⁸⁵ Not all case law meets the definition of art, and thus not all case law embodies the legal Idea.

The meaning and re-construction of any judgment is always open for review; precedents do not speak for themselves, rather they require interpretation and application to factual situations to be meaningful. New circumstances cast new light on existing rules and procedures, so that while total revision of the Idea of such rules is not achieved (and nor should it be), judges are free to rework them and re-interpret them in a meaningful way.³⁸⁶ Interpretation "is an occasion for interested and creative attempts at hermeneutical appropriation."³⁸⁷ In Heidegger's terms, appropriation is the gift of Saying, it allows beings to see the *is* and grants to us our place in nature so that we may be capable of being those who speak (ie, show) the truth.³⁸⁸

A well-known example of an important (or 'good' in Aristotle's terms) judicial text is Lord Atkin's dictum in *Donoghue v Stevenson*³⁸⁹, because its Idea is not only legally consistent and universal (ie, true), it is also a wonderful example of dialectic at work. Most valuably his dictum is profligate, meaning it lends itself to new and diverse renderings. This flexibility, combined with clarity of legal and equitable principles, is what makes a case embody the Idea of law.³⁹⁰

The analogical reasoning applied by Lord Atkin suggests an inductive form. His 'neighbourhood principle' attempts to lay down a reformed and generic test of duty of care in negligence, and in doing so Lord Atkin succeeds in formulating a

³⁸⁵ Ibid, 132.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Heidegger, M *On the Way to Language* (trans) Hertz, P D (1971) 115, 126, 135.

³⁸⁹ (1932) A.C. 562. The appellant's friend purchased for her a bottle of ginger-beer from a café. The appellant drank some, and as her friend was pouring the remaining ginger-beer into a glass, which arrived in an opaque bottle, a decomposed snail floated out of the bottle and into the tumbler with the ginger-beer. The appellant alleged that she became physically ill as a consequence of drinking the contaminated ginger-beer, and she brought an action in negligence against the drink's manufacturer.

³⁹⁰ Hutchinson, A *Evolution and the Common Law* (2005) 132.

principle that is wide enough to incorporate the dicta in earlier cases.³⁹¹ Both forms of judicial reasoning (deductive and inductive) are applied as a way of ensuring consistency in any given body of law.³⁹² As will be shown later, the neighbourhood principle has since been invoked often by judges as the starting point of inquiry in negligence cases. Lord Atkin's dictum in *Donoghue v Stevenson* has stood the test of time and legitimacy because, as will be seen below, the dictum is validly reasoned and logical, and the progression of law set out there is universally valid (true).

As we mentioned above, precedents cannot speak for themselves, they require interpretation/application. Precedents provide the judicial and lawyerly opportunity for creative hermeneutical appropriation, and past legal decisions provide the opportunity for further manufacture and revision of meaning just as much as they present the authority for a present case's resolution. It is the richness and opacity of important cases that recommend them as good judicial texts.³⁹³

The conceptual opposites of change and stability need not be opposing in the law. In fact, one of the constants of the adjudicative function is change. Stability in the law is maintained through judicial acts of revision; “[t]ransformation is the lifeblood of the common law’s vibrant tradition.”³⁹⁴ Professor John Farrar describes case law as a mosaic, “where the pattern emerges as the work develops.”³⁹⁵

Put another way, past judicial opinions combine to form:

a valuable institutional almanac of experimental strategies whose relevance and results are to be tested and retested in the service of making society a better place to live.³⁹⁶

³⁹¹ See discussion *infra* at 100.

³⁹² Farrar, *J Introduction to Legal Method* (1977) 65.

³⁹³ Hutchinson, *supra* n 390 at 132.

³⁹⁴ *Ibid*, 162.

³⁹⁵ Farrar, *supra* n 392 at 62.

³⁹⁶ Hutchinson, *supra* n 390 at 186.

For lawyers and judges, every factual discovery, every legal conclusion is provisional and open to further interpretation. There always exists the possibility of future revision, while being guided by the Idea.³⁹⁷ White illustrates this point by giving the example of a Platonic dialogue. In Plato's *Phaedrus*, Socrates makes two speeches: one against love, and one in favour of it. White says it is a common feature of Platonic dialogue to end with Socrates being perplexed about the matter of which he speaks; either that, or he reaches a conclusion that, even in the context of the dialogue, leaves itself open to doubt.³⁹⁸ White draws the analogy between Platonic dialogue and the law, by saying:

[that] each performance in the law is the best we can do at the time, but it is always open to revision: by appeal, by distinction, by overruling, by amendment.³⁹⁹

Farrar explains that, once judicial pronouncements have been recorded, they become part of the system of present and, in so becoming, are subject to the Aristotlean practice of treating like cases alike.⁴⁰⁰

The doctrine of precedent produces in a legal system certainty and consistency.⁴⁰¹ The Latin term *stare decisis* literally means 'to stand by what has been decided', and is most often used to describe the doctrine of precedent.⁴⁰² However, Farrar says that, strictly speaking, the term should read "*stare rationibus decidendis* since it is the *ratio decidendi* not the decision which binds."⁴⁰³

In *Collector of Customs v Lawrence Publishing Co Ltd*,⁴⁰⁴ Richardson J states:

³⁹⁷ White, J B "Writing and Reading in Philosophy, Law and Poetry" in Oxford University Press <<http://www.oup.co.uk/pdf/0-19-829813-7.pdf>> 10.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Farrar, supra n 392 at 63.

⁴⁰¹ Spiller, P *New Zealand Law Dictionary* (4th ed) (1995) 224.

⁴⁰² Ibid.

⁴⁰³ Farrar, supra n 392 at 77.

⁴⁰⁴ *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404.

Adherence to past decisions promotes certainty and stability. People need to know where they stand, and what the law expects of them. So do their legal advisers...However, any judicial development and change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in the particular case.⁴⁰⁵

The basic method of legal reasoning is that of analogy between cases. Farrar describes analogy as:

an imperfect form of induction, [as] it proceeds on the basis of a number of *points of resemblance* of relations or attributes between cases.⁴⁰⁶

Analogical reasoning relates not merely to the number of common attributes or relations which are found to exist between cases, but also to the legal relevance and factual importance of these attributes or relations.⁴⁰⁷ These matters are ultimately ones of “practical judgement”,⁴⁰⁸ or what Aristotle calls ‘practical wisdom’, which includes judges’ own normative belief and moral value bases.

The main rhetorical device applied in law is the judicial appeal to authority.⁴⁰⁹ Analogical reasoning uses ‘resemblance’ between facts as a normative step in determining the relevance of the legal rule to the present facts.⁴¹⁰ Farrar says that the judicial debate that takes place about similar and dissimilar facts actually just skims the surface of the process.⁴¹¹ Behind the issue of factual resemblance is “the complex question of the *desirability and expediency* in extending the rule to the new fact situation.”⁴¹² Issues of desirability and expediency are fundamentally policy and value considerations, which arise for the judge as part of her adjudicative function.⁴¹³

⁴⁰⁵ Ibid, 414.

⁴⁰⁶ Farrar, supra n 392 at 63.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid, 48.

⁴¹⁰ Ibid, 63.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Ibid.

It is common knowledge that case law involves using reasoning by analogy, but there is another important aspect to judicial reasoning. Case law must develop by using the skill of reasoning by way of legal rules. Farrar explains that, in formulating rules, judges classify them into categories and then determine the concepts within the categories.⁴¹⁴ This approach is part of the system's treating like cases alike, and is an important part of the legitimacy of case law.⁴¹⁵

Edward Levi, in his book *An Introduction to Legal Reasoning*,⁴¹⁶ describes legal reasoning in more detail:

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a threefold process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.⁴¹⁷

Joseph Horowitz believes legal reasoning, or reasoning by analogy, to be inductive in its concept and highly intuitive in its practice.⁴¹⁸ For my part, I consider that analogical reasoning is capable of being both inductive and deductive, but I would say that it is more commonly deductive, in that the court takes a general principle set down in a similar-fact case and applies it to form a particular conclusion in the present case. However, as we will see subsequently, it is in important judicial opinions that inductive reasoning is present.

Horowitz says the legitimacy of judicial interpretation depends on three kinds of grounds:

legal grounds supplied by the existing system, methodological grounds, and empirical grounds regarding the pertinent aspects of the general will.⁴¹⁹

⁴¹⁴ Ibid, 64.

⁴¹⁵ Ibid.

⁴¹⁶ Levi, E H *An Introduction to Legal Reasoning* (1962).

⁴¹⁷ Ibid, 1-2.

⁴¹⁸ Horowitz, J *Law and Logic* (1972) 79.

⁴¹⁹ Ibid.

Judicial reasoning combines the facts of the case with the above types of grounds.

The ability to adapt:

such crude supporting material to the purpose of rational legislation, interpretation, and judgment, is a major task of legal methodology.⁴²⁰

Klug Ulrich uses the phrase “analogical inference (*argumentum a simile*)”⁴²¹ to describe the legal process of analogical reasoning. Horovitz, using Klug’s phrase, states that analogical inference occurs when:

a legal rule whose explicit formulation refers to a certain state of affairs is applied to a different state of affairs, congruent with the first ‘in all essential respects’. *In other words, by means of analogical inference a given legal rule is brought to bear upon an unforeseen case which corresponds, nevertheless, to the ‘basic idea’ of the rule* [Emphasis added].⁴²²

As the law develops, we are able to pull out broad, conceptual statements of legal principle, which dwell in the realm of generality but that correspond to the ‘basic idea’ of the rule. Farrar says these far-reaching principles often epitomise the legal system’s basic values or traditions.⁴²³ To illustrate his statement, he gives the example of equitable maxims - such as ‘no man may profit from his own wrong’ and ‘she who comes to equity must do so with clean hands’.⁴²⁴ Over-arching common law principles will often, but not always, express an ethical or moral value base that has gained legitimacy at law.⁴²⁵ The ethical or moral value base of which Farrar speaks is what we have referred to as natural law, or the Idea of law.

The term legitimacy, in accordance with its Latin origins, means conforming with the law, or simply legality.⁴²⁶ Legitimacy works:

⁴²⁰ Ibid.

⁴²¹ Ibid, 21. Horovitz discusses Klug Ulrich’s theory in Ulrich, K *Juristische Logik* (2nd ed) (1958).

⁴²² Ibid, 32.

⁴²³ Farrar, J *Introduction to Legal Method* (1977) 64.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ Ibid, 10.

in terms of the *impersonal rational authority* of the law – the rule of law not men – accepted both by those who administer the system and by the population at large.⁴²⁷

Rationality is vital to the ‘law’s’ legitimacy,⁴²⁸ because every legal rule and practice ought to be justifiable on logical and rational (ie, impersonal) grounds.

Weber tells us that rationality has two aspects to it. The first being that rationality is “a formal logical aspect based on intellectual consistency between the legal rules, principles, standards and concepts.”⁴²⁹ Farrar observes that Weber’s first aspect is relatively static.⁴³⁰ The second aspect is “a substantive ideological or value aspect in the sense of conformity with the changing values of society.”⁴³¹

Farrar observes that the second aspect is more dynamic than the first.⁴³² The two Weberian aspects, inherent in rationality, represent:

an antinomy which is constantly being resolved in the course of legal development. Law must be stable, yet it cannot stand still.⁴³³

Ulrich defines legal logic as being “the theory of the rules of formal logic applied within the framework of adjudication.”⁴³⁴ Like Farrar, Klug sees legal logic as being an example of practical logic (as occurs in dialectic), as opposed to general logic (which is purely theoretical). In the context of adjudication, or judicial law-making, arguments are presented, law is applied, application is openly reasoned and conclusions are drawn.⁴³⁵

⁴²⁷ Ibid.

⁴²⁸ At least, it is to those who accept the Enlightenment or the Greek idea of logos.

⁴²⁹ Farrar, supra n 423 at 10. Farrar discusses Weber’s views of rationality in Weber, M *Law in Economy and Society* (trans) Rheinstein, M (1954).

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Horovitz, supra n 418 at 21. Horovitz quotes Klug Ulrich in Ulrich, K *Juristische Logik* (2nd ed) (1958)

6.

⁴³⁵ Ibid. Horovitz discusses Klug Ulrich’s theory in Ulrich, K *Juristische Logik* (2nd ed) (1958) 7.

A judge's decision on the facts of any case, which may be called *res judicata* (literally meaning, the thing has been adjudicated upon), is binding only on the parties to that particular action.⁴³⁶ In saying this, we are distinguishing between the decision in a given case and the concept of law that is explicitly relied upon in that case. The latter is what we call the *ratio*, which is something more abstract than the decision itself, and is a concept that gets absorbed into the general body of law.⁴³⁷

Farrar defines the *ratio* as “the reason for the decision or as the underlying principle of a case which forms its authoritative element.”⁴³⁸ Sir Rupert Cross describes the *ratio* as:

Any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.⁴³⁹

Farrar says that *ratio decidendi*, as a concept, is difficult to define comprehensively “since its *function* is to bridge the gap between reasoning by analogy and reasoning with rules.”⁴⁴⁰

In determining whether to follow the *ratio* set down in a previous but similar case, it is:

necessary to examine the way in which the case was argued and pleaded, the process of reasoning adopted by the judge and the relationship of the case to other decisions. It is also necessary to consider the status of the court itself.⁴⁴¹

⁴³⁶ Farrar, *supra* n 423 at 66.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*, 67. Farrar quotes Sir Rupert Cross in Salmond, *J Jurisprudence* (11th ed) (1966) 77.

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*, 69. Farrar discusses the views of Sir Rupert Cross in Cross, *R Precedent in English Law* (2nd ed) (1997) 76.

Generally speaking, the *ratio* is only prescriptive, for use in a later case, where the facts in that case are ‘on all fours’ in every sense with the former.⁴⁴² However, in a practical sense, the court considers whether:

*some of the facts at some of their levels of generality [are] more relevant to its present decision than is the absence of the rest of them.*⁴⁴³

Put another way, the question is one of analogical relevance of the former case’s *ratio* to the circumstances of the present case.⁴⁴⁴

Farrar says that the concept of *ratio* is best understood as “a *technique or process of abstraction and generalisation* which assumes its importance in later cases.”⁴⁴⁵

Put more generally, the *ratio* is not so much a rule in itself, but rather it is “*an analogical technique used to create a rule.*”⁴⁴⁶

In contrast to the *ratio* of a case, sometimes judges will espouse what we call *obiter dicta*. *Obiter* consists of a judge’s comment on the case based on hypothetical facts – that is, facts that are not before the court for adjudication.⁴⁴⁷

Both *ratio* and *obiter* are analogical techniques, but whereas *ratio* provides the certainty of having a rule to follow, *obiter* merely sets out statement that may be of value to subsequent judges.⁴⁴⁸ Usually, *obiter* is not a judicial pronouncement that has been fully reasoned or deeply considered as it relates to the case at hand, and so the absence of dialectic supporting *obiter* makes it less valuable (depending, of course, on the court from which the *dicta* emanates).⁴⁴⁹

⁴⁴² Ibid, 70.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid, 71.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid, 68.

⁴⁴⁸ Ibid, 72.

⁴⁴⁹ Ibid.

However, as we have seen, no legal rule or case law principle is settled for all time. The other elements involved in the process of judicial reasoning – making it one of practical reasoning, mean that adjudication is not a strictly logical process.⁴⁵⁰

Professor Julius Stone sums up the common law tradition:

In short a ‘rule’ or ‘principle’ as it emerges from a precedent case is subject in its further elaboration to continual review, in the light of analogies and differences, not merely in the logical relations between legal concepts and propositions, not merely in the relations between fact situations, and the problems springing from these; but also in the light of the import of these analogies and differences for what is thought by the latter court to yield a tolerably acceptable result in terms of ‘policy’, ‘ethics’, ‘justice’, ‘expediency’ or whatever other norm of desirability the law may be thought to subserve. No ‘ineluctable logic’, but *a composite of the logical relations seen between legal proposition, of observations of facts and consequences, and of value judgments about the acceptability of these consequences*, is what finally comes to bear upon the alternatives with which ‘the rule of *stare decisis*’ confronts the courts, and especially appellate courts. And this, it may be supposed, is why finally we cannot assess the product of their work in terms of any less complex quality than that of wisdom.⁴⁵¹

Thus, case law develops as a product of practical wisdom, and emerges out of adjudicative situations. Judges must combine the skills of reasoning by analogy with reasoning by rules.⁴⁵² Indeed, legal rules may be expanded or narrowed down according to the situation. To a certain degree, and within the limits of our legal system, judges may choose to follow or disregard certain rules, in order to do justice in the case before them.⁴⁵³ For example, judges may choose to distinguish, follow or affirm other judgments in any given area, and while this ability depends largely on the factual matrix at hand, it is the judge who ultimately decides the facts of a case. Farrar sums up the judicial position by saying that judges are given “pockets of discretion within a framework of rules.”⁴⁵⁴

⁴⁵⁰ Ibid, 65.

⁴⁵¹ Ibid, 82-83. Farrar quotes from Farrar, J “The Ratio of the Ratio Decidendi” (1959) 22 M.L.R. 597, 618.

⁴⁵² Ibid, 65.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid, 66.

White believes that the most important result a judicial opinion can achieve is “the character the court gives itself in its writing and the opportunities for thought and community that it creates.”⁴⁵⁵

The most useful way for judges to ‘do’ legal philosophy, in the context of adjudication, is to do it “pragmatically, usefully, and poetically.”⁴⁵⁶ Hutchinson says that law is not only the calling of thinkers, which is the commonly held view, but also a place for artists and poets.⁴⁵⁷ He says that the difference between science and art, or philosophy, is one of “emphasis and practice, not essence and theory.”⁴⁵⁸ If more artistic and poetic, Hutchinson says that judges will also become better legal thinkers and political theorists.⁴⁵⁹ While I agree with Hutchinson, I think that law needs to be *defined* as art, so that it is more likely to be successful in relaying the Idea of the law in a rich, lasting and forceful manner.

Art can be seen as something that gives us a performance, and in so doing it performs both itself and its function in the world. Hutchinson says that art’s performance is not something that is peripheral, rather it is actually “essential to any genuine attempt to understand the text’s meaning.”⁴⁶⁰ Further, he explains:

[E]very performance is an event, but not one in any way separate from the work – the work itself is what takes place in the event of performance.⁴⁶¹

With this, we have come back to the Aristotelean view that application is an essential element to the meaningful determination of the law. We have seen the importance and function of dialectic in judicial pronouncements, and we now have a conceptual understanding of the system of legal rules that forms part of the agreed definition of art.

⁴⁵⁵ White, J B *Heracles’ Bow: Essays on Rhetoric and Poetics of the Law* (1985) 118.

⁴⁵⁶ Hutchinson, A *Evolution and the Common Law* (2005) 109.

⁴⁵⁷ *Ibid*, 110.

⁴⁵⁸ *Ibid*.

⁴⁵⁹ *Ibid*.

⁴⁶⁰ *Ibid*, 290.

⁴⁶¹ *Ibid*, 147.

The next part of this thesis analyses the development of the duty of care rule in negligence, leading up to and culminating in Lord Atkin's dictum in *Donoghue v Stevenson*, with a view to determining whether this body of law meets the 'system of rules and principles' aspect of our definition of art.

II.III Development of a Principle: Duty of Care

In lay terms, the word 'negligence' is used to connote a carelessness.⁴⁶² In legal terms, negligence is the name given to a particular type of tort (ie, a civil wrong), for which legal redress is available.⁴⁶³ The threshold test for liability in negligence at law is that the defendant must owe to the plaintiff a duty to take care when performing a task. The duty of care test acts like a filter for potential legal action, as there are sound policy reasons for limiting the cases of negligence brought before the courts.⁴⁶⁴

The duty of care test is primarily concerned with the relationship of the parties. The nature and scope of the test is described by Stephen Todd, thus:

There is no satisfactory all-embracing test that can be applied in any case to determine the question of duty: indeed, the inquiry that has to be made is incapable of formulation in such a way. However, the courts have laid down some guiding principles which can resolve the more straightforward case and which provide at least a reference point in others.⁴⁶⁵

The guiding principles that Todd refers to are discussed *infra* in the present chapter.

⁴⁶² Allen, R (ed) *The New Penguin English Dictionary* (2000).

⁴⁶³ Farrar, J *Introduction to Legal Method* (1977) 235. The elements required to establish a case in negligence are, briefly: a duty of care being owed; breach of the duty of care; damage suffered by the plaintiff that was caused by the defendant's breach; and damage that was proximate to the consequences of the breach. For a fuller explanation see Todd, S (ed) *The Law of Torts in New Zealand* (3rd ed) (2001) 140-267.

⁴⁶⁴ See Todd, S (ed) *The Law of Torts in New Zealand* (3rd ed) (2001) 142.

⁴⁶⁵ *Ibid*, 143.

Farrar observes that the development of the tort of negligence took place in the context of:

a period of great economic and social change which is marked by the gradual growth of mass manufacturing as a result of the industrial revolution.⁴⁶⁶

Todd affirms Farrar's statement, explaining that it was the arrival of industrialisation that gave rise to a substantial number of tort actions, giving impetus to the courts to consider a new category of duty that sat outside contract law.⁴⁶⁷ Todd calls the early development of negligence cases 'ad-hoc', and says that by the late 19th century, the courts began searching for a "general statement of principle explaining when a duty would be imposed."⁴⁶⁸

The present chapter considers the common law development of the duty of care test in negligence, leading up to and culminating in the famous case of *Donoghue v Stevenson*. I will analyse the developing case law for its consistency with the existing common law and equitable principles, and I will point out any deficiencies that I consider appear in the judges' reasoning. The object of the present exercise is to see whether the duty of care case law may properly be called true.

It is fair to say that the development of the duty of care test began with the case of *Dixon v Bell*,⁴⁶⁹ and the category set out in that case of 'dangerous things'. The facts of the case are brief. The defendant, being in possession of a loaded gun, sent one of his servants to fetch it for his use. He instructed another man, with whom he lodged, to take the priming out of the gun before giving it to the servant girl, who was aged around 13 or 14 years. The second man removed the priming from the gun and gave it to the girl, who proceeded to play with the gun and, in so doing, accidentally shot the plaintiff's son.⁴⁷⁰

⁴⁶⁶ Farrar, supra n 463 at 235.

⁴⁶⁷ Todd, supra n 464 at 144.

⁴⁶⁸ Ibid.

⁴⁶⁹ *Dixon v Bell* (1816) 105 E.R. 1023.

⁴⁷⁰ Ibid, 1024.

The lower court found for the plaintiff and awarded him damages. However, the Attorney-General moved for a new trial on the basis that the defendant had taken every precaution to render the gun safe for transportation. Lord Ellenborough CJ dismissed the application, finding on the facts that the defendant ought to have done more to make the gun safe.⁴⁷¹

The Court in *Dixon v Bell* lays down the general principle that, where a dangerous thing is in someone's care, that person has a duty to make it "safe and innocuous".⁴⁷² Where there is a want of care, and the thing itself is left in such a state that it is able to do mischief, the law will hold the defendant responsible for the resulting harm.⁴⁷³

In the present case, the defendant could have discharged all of the gun's contents, making it completely safe to handle, but because he didn't do so he showed want of care. It is interesting to note that the Court's decision is such, despite His Lordship recognising that "it was the defendant's intention to prevent all mischief"⁴⁷⁴ by taking out the priming.

In this case, Lord Ellenborough CJ recognises that natural law propositions of right and wrong exist, both in equity and common law. That he does so may be seen by the nature of his *ratio*. The Court here allows the common law rule that 'where there is a wrong, there is a remedy'⁴⁷⁵ to come to the fore, that is, he allows the truth of the law to assert itself on the facts. In summary, Lord Ellenborough CJ acknowledges the universal validity of natural law by implying that the rules of right and wrong exist as 'the nature of the thing'.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ A traditional legal principle, referred to in *Langridge v Levy* (1837) 2 M. & W. 519, 864.

Nor can we criticise *Dixon v Bell* on logical or procedural grounds. The principle laid down in this case may be called true in the Dworkin sense of the term, as following from the principles of justice, fairness and procedural due process, as well as the Aristotelean sense of the term.

The Court may be said to have applied practical wisdom, in the sense that “a solution which is more just than that of the law”⁴⁷⁶ was reached, and because practical wisdom is the application of the true, the universal order in the world. It is my view that Lord Ellenborough CJ has provided the best constructive interpretation of the law in the present case.

An important point to remember about *Dixon v Bell* is that it is a case involving a thing that is inherently dangerous. The Court did not analyse the concept of duty in relation to the plaintiff’s son; rather, it considers that because of the *nature* of the thing (ie, a gun) there is a duty to take care when handling it. This case is narrowly drawn, both in law and fact.

The next significant case in the development of the duty care principle is *Langridge v Levy*⁴⁷⁷. The case states that the plaintiff’s father bought from the defendant a gun, which the father told the defendant both he and his son would be using. The defendant told the father that the gun was made by a well-respected gun-maker (Nock), but it was later found that the gun was not one made by Nock at all. In fact, the gun in question was ill-manufactured, unsafe and dangerous. The Court found that the defendant knew of the truth of these matters at the time he warranted the gun’s pedigree and suitability to the father. The gun exploded while being used by the plaintiff son, and as a consequence the son lost the use of one of his hands.⁴⁷⁸

⁴⁷⁶ Perelman, *C Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (1980) 89.

⁴⁷⁷ *Langridge v Levy* (1837) 2 M. & W. 519.

⁴⁷⁸ *Ibid*, 868.

Counsel for the plaintiff argued *Dixon v Bell* in support of his case, but Lord Parke has this to say about the width of the *Dixon* principle:

We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer; we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability...and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby.⁴⁷⁹

In my view, Their Lordships may have applied different reasoning had *Dixon v Bell* been authority for a duty of care being owed to those the defendant ought to reasonably foresee might be harmed (ie, Lord Atkin's 'neighbourhood principle').⁴⁸⁰ Instead, the duty related to the gun itself and as Lord Parke rightly observes, there was no filter in place to prevent the floodgates from opening in relation to that duty concept. Another reason for the differing approach appears to be the different circumstances in the two cases: the case of a gun-owner being narrower than a shop-keeper, who in theory may owe a duty to the world at large.

Instead, the judgment proceeds under the head of fraudulent misstatement. The case's principle may be stated thus: while a mere falsehood is not enough to give rise to a right of action, where that falsehood is accompanied by an *intention* that it be acted on by the injured party (and the injury relates to the falsehood), the plaintiff will have a remedy for deceit.⁴⁸¹ Further, it does not matter whether the instrument, which is the object of the falsehood, is given to a third party for delivery to the plaintiff, or even that the third party was also intend to be deceived.⁴⁸² What matters is that harm occurs while the thing is in the possession

⁴⁷⁹ Ibid.

⁴⁸⁰ See *infra* at 100 for a fuller discussion.

⁴⁸¹ *Langridge v Levy*, *supra* n 477 at 868.

⁴⁸² Ibid.

of a person to whom the defendant's representation was either directly or indirectly communicated, and for whose use the defendant knew it was bought.⁴⁸³

The Court found that, when the defendant sold the gun to the father and son for their use, he knew that it was of inferior quality to that which he represented. The father and the plaintiff would not have used the gun 'but-for' the defendant's warranty as to its pedigree and suitability for their purposes (ie, hunting).⁴⁸⁴ A deciding factor for the Court appears to have been that the consequences of the fraud were not too remote:

We therefore think, that as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.⁴⁸⁵

To sum up, *Langridge v Levy* is a case of fraudulent misstatement, as opposed to being framed as a duty of care case. The important factors for the Court in their decision are that the defendant knew of the falseness of his statement and that he knew the plaintiff and his son would be the users of the gun. While this case provides, in my view, the 'right' decision on the facts, it does not continue the line of *Dixon v Bell* dictum relating to a duty owed where one is in charge of a dangerous thing.

Thus, the right outcome was reached here, even though the *ratio* in each case differs completely: one case puts forward a duty principle; and the other puts forward a fraudulent misstatement principle. The Court *may* be said to have applied practical wisdom, in the sense that "a solution which is more just than that of the law"⁴⁸⁶ was reached. However, for Aristotle, practical wisdom is the application of the true, the universal order, and such an application was not achieved by the Court in *Langridge v Levy*.

⁴⁸³ Ibid, 869.

⁴⁸⁴ Ibid, 868.

⁴⁸⁵ Ibid.

⁴⁸⁶ Perelman, *supra* n 476 at 89.

In my view, the main problem with *Langridge v Levy* is not that the result was achieved by application of a different principle (because the facts are not ‘on all fours’ with those in *Dixon v Bell*), rather, it is that Lord Parke appears to have read the *Dixon v Bell* dictum as being wider than what it actually is. What the Court in *Dixon v Bell* held is this: where a dangerous thing is in someone’s care, that person has a duty to take care with it, to make it safe so that it cannot do mischief to others. The Court did not hold:

[W]herever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer.⁴⁸⁷

While Gadamer says:

[that] judging the case involves not merely applying the universal principle according to which it is judged, but co-determining, supplementing, and correcting that principle.⁴⁸⁸

Lord Parke has done more than supplement the *Dixon v Bell* principle – he has altered it entirely through misunderstanding its scope.

Langridge v Levy may not be called true on Dworkin’s test of true law, either - which is that propositions of law may be called true if:

they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community’s legal practice.⁴⁸⁹

In my view, Lord Parke has not provided the best constructive interpretation of the law in the present case. I consider that Chief Justice Ellenborough’s dictum may have been applied to the facts of *Langridge v Levy*, by process of inductive

⁴⁸⁷ *Langridge v Levy*, supra n 477 at 868.

⁴⁸⁸ Gadamer, H G *Truth and Method* (1979) 39.

⁴⁸⁹ Hutchinson, A *Evolution and the Common Law* (2005) 72. Hutchinson discusses Dworkin, R *Law’s Empire* (1986) 110.

reasoning, so that the scope of the existing test may have been extended (which, as we will see, is what has happened in some subsequent cases). However, Lord Parke chose not to do so in the present instance, choosing instead to proceed with a completely different cause of action.

The judgment cannot be called true in Aristotle's natural law sense, either. The nature of the thing does not assert itself, for the nature of the thing in *Langridge v Levy* was essentially the same as that in *Dixon v Bell*. Granted, the scope of the duty would have been infinitely wide, if left unqualified, in the former case, but both involved dangerous items and the harm was of the same kind. Lord Parke could have chosen to use analogous inference to refine the scope of duty owed, for use in similar cases in the future by reasoning:

[S]ome of the facts at some of their levels of generality [were] more relevant to its present decision than [was] the *absence* of the rest of them.⁴⁹⁰

Langridge v Levy provided an opportunity for acting on judicial insight into future cases involving vendors of dangerous things, and the Court had the opportunity to both qualify and extend the scope of the *Dixon v Bell* dictum to incorporate all vendors of dangerous things (not just those who make a false representation about them). This would have been the consistent (ie, universal), reasoned and morally just approach. If Lord Parke had done so, we would be able to say that he was allowing the nature of the thing (ie, the principle) to assert itself and that the Idea of law was present in his work.

The next case in the development of negligence is that of *Winterbottom v Wright*.⁴⁹¹ In this case, A (the defendant) contracted with the Postmaster-General to provide a mail-coach to transport mail-bags to another town. B contracted with the Postmaster-General to horse the coach, and he also contracted C (the plaintiff) to drive the coach. The plaintiff suffered injury while driving the mail-coach

⁴⁹⁰ Farrar, J *Introduction to Legal Method* (1977) 70.

⁴⁹¹ *Winterbottom v Wright* (1842) 10 M. & W. 108.

because of defects in its construction, and he brought an action against the defendant for damages.⁴⁹²

The Court unanimously held that, because there was no privity of contract between the plaintiff and the defendant, the action must fail. Lord Rolfe states that, in that case:

the duty...is shewn to have arisen solely from the contract; and the fallacy consists in the use of that word 'duty'.⁴⁹³

Since there was no contractual relationship between the parties, there could be no duty owed to the plaintiff.

The Court appears to have taken its approach, in refusing to consider the tortious concept of duty of care, for two reasons. The first is that, as was subsequently explained in *Heaven v Pender*,⁴⁹⁴ the pleadings were drawn alleging breach of contractual duty only.⁴⁹⁵ The second is that, the Court appears to be concerned on policy grounds with the consequences of the defendant owing a duty of care to a third party driver. Lord Alderson reasons that, if the plaintiff were able to sue in that case, "there is no point at which such actions would stop."⁴⁹⁶ Lord Abinger explains that, if the plaintiff could sue:

every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action.⁴⁹⁷

The Court states that the operation of these types of contracts must be confined to those who enter into them.⁴⁹⁸

⁴⁹² Ibid, 402-403.

⁴⁹³ Ibid, 405.

⁴⁹⁴ *Heaven v Pender* (1883) 11 L.R. 503 (CA).

⁴⁹⁵ Ibid, 513.

⁴⁹⁶ *Winterbottom v Wright*, supra n 491 at 405.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

The Court also appears to have been influenced by the policy concerns raised in *Langridge v Levy* about a general duty of care test being laid down. While I agree that Lord Parke's re-framing of the *Dixon v Bell* test is unworkably wide, there was here an opportunity for the Court to apply Lord Parke's wide dictum and qualify it by setting down a class of persons to whom a duty is owed, and a general principle about remoteness of damage.

However, the Court in *Winterbottom v Wright* considered that *Langridge v Levy* could be distinguished on the facts because, there the gun was bought for the use of the son, and in the present case, the action is brought simply because the defendant was a contractor with a third person. Lord Abinger reasons that, in *Langridge v Levy*, the son "was really and substantially the party contracting."⁴⁹⁹ For my part, I see this statement as being a stretch of privity of contract, though there are obviously material differences in the facts of the two cases. Lord Alderson reasoned that *Langridge v Levy* should be distinguished because "[t]here a distinct fraud was committed on the plaintiff."⁵⁰⁰

It is possible that, if the Court in *Langridge v Levy* had used analogous inference in relation to the facts of *Dixon v Bell* (which it was open to the Court to do), and if the Court in *Winterbottom v Wright* had taken the consistent, reasoned and morally just approach of allowing the nature of the principle to develop and assert itself, we may have had a concept of duty of care similar to that laid down in the landmark case of *Donoghue v Stevenson* as early as 1842.

As mentioned above, the judicial task consists in highlighting the tension between the law and the facts, and bringing it into the light for examination. In Heidegger's terms, this means that judges must create the World so that Being may dwell in the Open. I do not consider that the Court in *Winterbottom v Wright* engages in dialectic, because the case does not engage in the process of thesis, antithesis and

⁴⁹⁹ Ibid, 404.

⁵⁰⁰ Ibid, 405.

synthesis in the context of previous case law. Thus, the opportunity to create a new richness of meaning is lost, as is the chance to find and apply the ‘truth’ of the law. Good judicial texts will be written to provide an openness (*aletheia*), a space between Saying and meaning that allows the existing legal Idea to speak to us.

If the law is always speaking to us (Saying), which it is, it ought to be both open and constant, so that it gains legitimacy for all people and applies even-handedly to all people. I consider *Winterbottom v Wright* to set up unpredictable reasoning in the duty of care area, because it does not weigh and balance the body of law as a whole in its application to the facts of the case. Further, the Court does not engage in Gadamer’s ‘free-play of imagination’, which allows the law to constantly re-invent itself.

Farrar says that common law principles will often express a moral value base that has gained legitimacy at law.⁵⁰¹ Broadly, the nature of the thing in this instance could be said to be the common law rule that ‘where there is a wrong, there is a remedy’.⁵⁰² Or, more specifically, the ‘basic idea’ may be said to be that where there is a lack of care, and the thing itself is left in such a state that it is able to do harm, the law will hold the defendant responsible for any consequent damage.⁵⁰³

Judicial opinions ought to be *mimesis*; that is, they should imitate the real essence of a thing, thereby revealing the truth of a thing or matter in the Open, but the present case does not do so. Nor do their Lordships engage in practical wisdom, because they do not seek out, “on the basis of equity, a solution which is more just than that of the law.”⁵⁰⁴

⁵⁰¹ Farrar, *supra* n 490 at 64.

⁵⁰² A well-known and oft-quoted legal principle, referred to in *Langridge v Levy* (1837) 2 M. & W. 519, 864.

⁵⁰³ *Dixon v Bell* (1816) 105 E.R. 1023, 1024.

⁵⁰⁴ Perelman, *C Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (1980) 89.

Winterbottom v Wright is not a ‘good’ or ‘important’ case in the duty of care area, and it does not adhere to the very best traditions of the common law.⁵⁰⁵ The case does not bring the Idea or the true into the Open, and so (like *Langridge v Levy*) it fails to meet the first part of our definition of art.

The next case for consideration is *Longmeid v Holliday*,⁵⁰⁶ which involves the sale and purchase of a lamp, called ‘The Holliday Lamp’, by a husband for his wife. The defendant was the maker and seller of Holliday Lamps, and he sold one of these to the husband. The trial Court found that, at the time the defendant warranted the lamp to be fit and proper for the purpose of use, he did not know that the lamp was defective. As a result of the defect, the lamp exploded when the wife tried to use it, injuring her in the process.⁵⁰⁷

In the lower Court, the jury found that the defendant was not guilty of any fraudulent or deceitful representation, and the husband and wife plaintiffs appealed the decision. The principle on which Lord Parke (of *Langridge v Levy*) decided the case on appeal is this:

A tradesman, who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person, is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article.⁵⁰⁸

Following the reasoning of *Winterbottom v Wright*, the Court held that the action must fail, because there was no fraudulent misrepresentation to the husband about the lamp, and there was no contractual relationship between the defendant and the wife. *Langridge v Levy* was distinguished in the present case, but the Court observes that, had the defendant been guilty of fraudulent misrepresentation and

⁵⁰⁵ Hutchinson, *A Evolution and the Common Law* (2005) 189.

⁵⁰⁶ *Longmeid v Holliday* (1851) 6 EX. 760.

⁵⁰⁷ *Ibid*, 752.

⁵⁰⁸ *Ibid*.

had he intended it to be used by the wife, then she would have had an action at law.⁵⁰⁹

The reasoning in *Longmeid v Holliday* makes it of interest for our purposes. Lord Parke concedes that there are other cases in existence, besides those of fraud, where a third party may sue for damage sustained. In fact, His Lordship gives a number of examples:

[I]f an apothecary administered improper medicines to his patient...and thereby injured his health, he would be liable to the patient, even where the father or friend of the patient may have been the contracting party, [for the apothecary], if he gave improper medicines...would be liable to an action for a misfeasance: *Pippin v Sheppard* (11 Price 40).⁵¹⁰

... ..

A stage-coach proprietor, who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustains personal damage, is liable to him; for it is a misfeasance towards him, if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards any one travelling on the road.⁵¹¹

.... ..

And it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon v Bell*...*But it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous, - a carriage for instance, - but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it* [Emphasis added].⁵¹²

The first of the above paragraphs deals with a professional duty of care, and this may explain why the Court dismisses the principle contained in it as inapplicable to the present situation, although it is arguable that lamp-makers fall into the professional category. However, I do not see any material difference between the

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid, 755.

⁵¹¹ Ibid.

⁵¹² Ibid.

principle set down in the second and fourth paragraphs. The second paragraph appears to dismiss the concerns of Lord Abinger in *Winterbottom v Wright* that if the servant could sue:

every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action.⁵¹³

Lord Parke appears to accept that any person travelling on the road who is injured by the stage-coach, being driven without due care, may bring an action in misfeasance. The difference in the dicta being that Lord Parke is talking about the coach being *driven* with undue care, as opposed to being of a faulty construction.

The fourth paragraph affirms the distinction Lord Parke makes between careful actions and a latent defect in an item that is not in itself dangerous, but curiously goes on to say that the defendant would not be liable even though the defect was discoverable by the exercise of ordinary care. I question what the conceptual difference is between the lack of care and skill drivers and apothecaries are expected to take and the lack of care and skill that is expected of a lamp-maker. There seems to me to be no difference – at least, not in the sense that the dictum in *Dixon v Bell* cannot be made analogous to the present facts. I consider that Lord Parke is confusing the ‘thing’ to be dealt with, in that he is looking at the defect in the lamp as opposed to the duty of care of the lamp-maker, which he has already said exists for drivers and apothecaries. Further, I think that Lord Parke could have made sense of previous authorities if he had not been confused about the principle issue for consideration.

In my view, *Longmeid v Holliday* is neither important nor good in terms of its *ratio* and its reasoning. While the Court does engage in dialectic, the reasoning is unable to be relied upon in future decisions, because the premises were flawed. The present case does not bring the duty of care Idea of law into the Open, because the common law relating to duty of care was neither applied nor developed, and as

⁵¹³ *Winterbottom v Wright* (1842) 10 M. & W. 108, 405.

such the case does not create *aletheia* in any sense of its usage (ie, neither the true nor the Open). In Aristotle's terms, Lord Parke's judicial ability as a craftsman may be seen as lacking by the quality of his judgment.

However, the next case of *George v Skivington*,⁵¹⁴ makes for better reading. The husband and wife plaintiffs in this case alleged that the defendant represented to them that a certain hair-wash would be fit for that purpose, without causing injury to the person using it, and that the plaintiff husband bought the hair-wash on the basis of that representation. The defendant professed to the husband to have made the hair-wash, saying that the ingredients in it were known only to him, and that they were carefully compounded by him. The plaintiff wife used the hair-wash, as the defendant knew she would do, and was injured as a result. The question for the Court was whether the plaintiffs' declaration showed good cause.⁵¹⁵

The principle of the case is espoused by Lord Kelly, who states that where a person makes an article sold for a particular purpose, and knows of the purpose for which it is bought and for whom the article is bought, he or she has a duty to that person to use ordinary care in making the article.⁵¹⁶

Unlike the previous cases in this area, Lord Kelly considers neither the false representation nor the lack of a contractual relationship between the defendant and the plaintiff wife to be relevant to the case.⁵¹⁷ Lord Kelly held:

[Q]uite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased.⁵¹⁸

⁵¹⁴ *George v Skivington* (1869) 5 L.R. 1.

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*, 3.

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*, 3-4.

The qualification on the Court's principle is that the duty will extend to a third party only where the defendant knows that that third party will be using the product. Lord Pigott explains, in *obiter*, the policy considerations for this qualification:

The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended. Suppose, for example, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could not be contended that the chemist was liable.⁵¹⁹

The Court refers to the facts of *Langridge v Levy* and states that a similar duty arose towards the plaintiff wife in this case as was found to exist for the plaintiff son in that case.⁵²⁰ However, Lord Kelly widens the principle from fraudulent misstatement to a duty that "the article sold should be reasonably fit for the purpose it was bought for and compounded with reasonable care."⁵²¹

Thus, the Court in this case develops the fraudulent misstatement dictum set down in *Langridge v Levy*, and also (whether intentional or not) develops and refines Lord Parke's dictum about the *Dixon v Bell* test. In this way, the Court here has created a new richness and aptness of meaning in an area of the law where these attributes had been lacking.

We said above that good judicial opinions are those written with an openness, a space between Saying and meaning that allows for future application and revision, as well as for the continuation of the legal Idea in question. *George v Skivington* is one such good judicial text, and is an important case. Here the law remains open, yet constant, even in the face of situational revision. The broad, conceptual statement set out by Lord Kelly dwells in the realm of generality but equally corresponds to the 'basic idea' of the common law tradition that we saw cited (but

⁵¹⁹ Ibid, 4.

⁵²⁰ Ibid.

⁵²¹ Ibid.

not developed) by Lord Parke in *Longmeid v Holliday*.⁵²² Further, because the case sets out its formal logic, based on intellectual consistency between legal rules, we may call the Court's reasoning both rational and legitimate.⁵²³

For Gadamer:

judging the case involves not merely applying the universal principle according to which it is judged, but co-determining, supplementing, and correcting that principle.⁵²⁴

Arguably, this is what the Court in *George v Skivington* has accomplished. Further, in the present case, we can see how the nature of the thing (ie, the common law duty) has asserted itself. The duty of care Idea remains absolute in its essence, but is refined and tailored to do justice in the circumstances, as well as for future use.

The Court applied practical wisdom to the facts of this case, and we may recall that Aristotle calls practical wisdom application of the true and universal order.⁵²⁵ Analogous to Plato's Idea of a thing, natural law is 'there' in a way that our moral consciousness knows the right outcome and is able to assess the equity or justice of a situation. The principle in *George v Skivington* is true in the natural law sense, and in the Platonic sense of the Idea of a thing. The judgment shows the essence of the thing, thereby revealing its truth in the Open.

The next case of interest in the developing duty of care case law is the Court of Appeal case of *Heaven v Pender*. The defendant in this case was a dry-dock owner (the purpose of which was for ships to dock for repairs) who put up scaffolding around the dry-dock so that the ships docked there could be painted and repaired. The plaintiff was a tradesperson, employed by a ship's owner, to paint the ship left in the dry-dock for repairs. When the plaintiff used the scaffolding set up by the

⁵²² *Longmeid v Holliday* (1851) 6 EX. 760, 765.

⁵²³ Farrar, J *Introduction to Legal Method* (1977) 10.

⁵²⁴ Hutchinson, A *Evolution and the Common Law* (2005) 172. Hutchinson quotes Gadamer, H G *Truth and Method* (1979) 39.

⁵²⁵ See text *supra* at 38.

defendant, a rope that held the scaffolding broke, and the plaintiff was injured as a result.⁵²⁶

Brett M.R. (as he then was⁵²⁷) sets out the principle upon which the case is decided:

[W]henver one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.⁵²⁸

In the present case, the Court appears to be *imputing* knowledge to persons in situations where a duty to use ordinary care and skill is owed.⁵²⁹ Indeed, the Court goes on to find that the defendant *must have known* of the use to which the scaffolding would be put.⁵³⁰ Thus, the Court widens the dictum in *George v Skivington* in this sense. Whether a duty arises is based on the circumstances, the position of the person and the risk of danger or injury that could result from improper care and skill.

The Court held that the defendant has an obligation to the plaintiff, even though there was no contractual relationship between them:

to take reasonable care that at the time he supplied the staging and ropes they were in a fit state to be used.⁵³¹

The Court further held that, because of the defendant's neglect in so doing, he is liable to the plaintiff for the injury sustained. (The Court was assisted in its decision by evidence showing that the ropes were scorched and unfit for use at the

⁵²⁶ *Heaven v Pender* (1883) 11 L.R. 503 (CA).

⁵²⁷ Brett M.R. later became Lord Esher M.R., as will be seen in the case of *Le Lievre v Gould* 1 QB 491 (CA).

⁵²⁸ *Heaven v Pender*, supra n 526 at 503.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*, 506.

⁵³¹ *Ibid.*, 503.

time the defendant put up the scaffolding.⁵³²) As we can see, there appear to be two parts to the Court's decision, that the defendant owes a duty of care, and that the ropes should be in a fit state to be used (ie, fit for their purpose).

In the present case, Brett M.R. makes clear the distinction between contractual duty and tortious duty:

If a person contracts with another to use ordinary care or skill towards him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty.⁵³³

As we can see, the Court of Appeal's dictum is wider than the dicta in both *Winterbottom v Wright* and *Longmeid v Holliday*.

Brett M.R.'s inductive reasoning, and the way he applies analogical inference, is worth setting out in full. He begins by surveying the way the law around a duty of care has thus far been developed, by setting out the two main strands of *ratio*. The first strand involves cases of collision and carriage, where drivers and railway companies are considered under common law to owe a duty to use ordinary care and skill to avoid danger or injury to other drivers and passengers (regardless of the absence of contractual relationship). The Master of the Rolls states:

And every one ought *by the universally recognised rules of right and wrong*, to think so much with regard to the safety of others who may be jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill, and injury ensue, the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury [Emphasis added].⁵³⁴

⁵³² Ibid, 504.

⁵³³ Ibid, 507.

⁵³⁴ Ibid, 508.

The next body of case law Brett M.R. considers is that which involves shopkeepers and proprietors, where “other phraseology has been used”⁵³⁵ to describe the duty owed. The courts have used the word ‘invitation’ to denote the trigger for a duty of care in these cases, which may be stated as imposing on oneself “a duty not to lay a trap”⁵³⁶ for the person entering one’s premises. The Court observes that each set of cases, while providing a rule for its own particular circumstances, does not provide a rule for the other – even though the two sets of case law are analogous. It seems to Brett M.R. “that there must be some larger proposition which involves and covers both sets of circumstances.”⁵³⁷

The Court, by a process of inductive reasoning, goes on to set out a larger proposition:

The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premises there must be a more remote and larger premise which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognised cases of liability. *It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case* [Emphasis added].⁵³⁸

In summary, Brett M.R. is acknowledging the universal validity of natural law; that is, the rules of right and wrong that exist as ‘the nature of the thing’. As we saw above, Plato believes that:

⁵³⁵ Ibid.

⁵³⁶ Ibid, 509.

⁵³⁷ Ibid.

⁵³⁸ Ibid, 509-510.

[in] [a]ccepting the existence of a realm, an order universal, harmonious and just, the wise man will draw upon this to present the ideal of a just political community for which he will formulate just laws which in his capacity as a judge he will be able to apply in an unequivocal way, without giving rise to criticism or controversy.⁵³⁹

Indeed, the judgment cannot be criticised on logical or procedural grounds. The principle laid down in *Heaven v Pender* may be called true in the Dworkin sense of the term, as following from the principles of justice, fairness and procedural due process, as well as the Aristotlean sense of the term, in that the nature of the thing is given the space to assert itself.

The Court has created a new legal test to include prior tests and cover previous fact situations. Thus, *Heaven v Pender* may properly be called an important or good case. As the law develops, judges have the opportunity to pull out broad, conceptual statements of legal principle, which dwell in the realm of generality but that correspond to the ‘basic idea’ of the rule. As we know, these far-reaching principles often epitomise the legal system’s basic values or traditions, and we can see that in the present case one of these is the fundamental difference between right and wrong.

In my view, the Court has succeeded in developing a richness, complexity and clarity around the duty of care test, for use in future cases. Brett M.R. has engaged in dialectic, because he has uncovered and resolved tensions in prior legal texts, in order to create a new richness and aptness of meaning. Brett M.R. has mastered legal interpretation such that we are able to see the past in a new light. Indeed, Hutchinson says that such “a judicial attitude and approach is in the very best traditions of the common law.”⁵⁴⁰

⁵³⁹ Perelman, C *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (1980) 88. Perelman discusses Plato’s view of justice.

⁵⁴⁰ Hutchinson, A *Evolution and the Common Law* (2005) 189.

The case shows the benefit of engaging in dialectic, so that tensions may be brought into the open, because then judges are in a better position to reason questioningly and logically; that is, there is a better opportunity to find and apply the universal ‘truth’ of the law. Truth appears in the dialectic of the Open. Further, this case allows a space for Saying, in that the broad general concept the Court has laid down may be readily applied – in continuation of the legal Idea - and revised in future situations.

In terms of policy considerations, the width of the principle is clarified by the Court, where Brett M.R. says that the duty concept only extends to the situation where the thing supplied would be:

used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons...⁵⁴¹

That is, the goods would be used before a period of time elapses in which a defect could or ought to be discovered.⁵⁴² The above dictum appears to be heading in the direction of Lord Atkin’s ‘neighbourhood principle’ (which is good news for Lord Parke, as it alleviates his concerns about someone owing a duty of care to the whole world).

Further, the principle applies itself only to those in reasonable contemplation of the supplier or maker of a thing, and this view is illustrated by the following comment of Brett M.R.’s:

It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not.⁵⁴³

⁵⁴¹ *Heaven v Pender* (1883) 11 L.R. 503, 510 (CA).

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

In considering previous case law, the Court comments sagely that *Langridge v Levy* was actually a case about remoteness, and ought not have been made into one about fraudulent misstatement.⁵⁴⁴ Further, the Court explains the reasoning in *Winterbottom v Wright* by saying that the problem for Lord Abinger in establishing a duty of care was the too-wide dictum in *Langridge v Levy*, and that he was right to be concerned about that dictum being extended further.⁵⁴⁵

However, *Heaven v Pender* was distinguished in *Le Lievre v Gould*,⁵⁴⁶ which is a case where the mortgagees of a builder's interest in several properties relied to their detriment on certificates given by a surveyor (appointed by the builder) to the effect that the buildings had reached the stages specified in the plans. The certificates turned out to contain untrue statements as to the progress of the buildings, and the mortgagees sought to recover the losses they sustained in reliance on the surveyor's certificates. The Court of Appeal held that the defendant surveyor owed no duty of care to the mortgagee plaintiffs, because there was no contractual relationship between the parties, and there was no evidence of fraud on the part of the surveyor.⁵⁴⁷

The *ratio* of the case appears to be this:

[The law of England] does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.⁵⁴⁸

Lord Esher M.R. (previously Brett M.R.) states:

A man is entitled to be as negligent as he pleased towards the whole world if he owes no duty to them.⁵⁴⁹

⁵⁴⁴ Ibid, 511.

⁵⁴⁵ Ibid, 513.

⁵⁴⁶ *Le Lievre v Gould* (1893) 1 Q.B.491.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid, 502.

⁵⁴⁹ Ibid, 497.

This statement is undoubtedly true, but the question becomes whether a duty is owed, and to whom. Lord Esher M.R. considers that *Heaven v Pender* may be distinguished in the present case, as it “has no bearing on the present question.”⁵⁵⁰

His Lordship sets out the *Heaven v Pender* dictum thus:

If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.⁵⁵¹

The above statement is close to the ratio in *Heaven v Pender*, but what Brett M.R. actually said was that the duty arises, not in a situation of physical proximity or nearness, rather “whenever one person is by circumstances placed in such a *position* with regard to another.”⁵⁵² Lord Justice Smith in *Le Lievre v Gould* narrows the *Heaven v Pender* principle in the following way:

The decision of *Heaven v Pender* was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other.⁵⁵³

I would agree with the above re-statement of the *Heaven v Pender* principle, providing Lord Justice Smith intended the word ‘proximity’ to mean ‘in foreseeable relation to’ or ‘in reasonable contemplation of’, and not in Lord Esher M.R.’s sense of physical proximity.

Lord Esher M.R. goes on to state that actions for misrepresentations contained in company prospectuses can only be brought against directors where those statements are proved to be fraudulent.⁵⁵⁴ Further, Lord Esher M.R. states that “negligence, however great, does not of itself constitute fraud.”⁵⁵⁵ With respect,

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² *Heaven v Pender*, supra n 541 at 503.

⁵⁵³ *Le Lievre v Gould*, supra n 546 at 504.

⁵⁵⁴ Ibid, 498.

⁵⁵⁵ Ibid.

His Lordship's proposition is true, but it does not follow that negligence may not be a common law head of action in itself.

Here, it is accepted that the surveyor was negligent in drawing up the certificates, but Lord Esher M.R. reasons:

Such negligence, in the absence of contract with the plaintiffs, can give no right of action at law or in equity.⁵⁵⁶

Lord Justice Bowen agrees with Lord Esher M.R., and his reasoning is that the two classes of case law set out in *Heaven v Pender* (carriage and 'invitation' cases) do not extend to situations of careless written statements.⁵⁵⁷ This is despite the fact that the common law already recognises a class of cases where a duty of care is owed by professionals in the course of their work,⁵⁵⁸ and it could be easily argued that a surveyor is such a professional.

Le Lievre v Gould is not a case that adds to the richness and clarity of the common law. Nor can it properly be called dialectic, as the case does not allow a space for the uncovering and resolution of the tensions in previous legal texts. Lord Esher M.R. appears to narrow the common law principle in *Heaven v Pender* without openly rationalising his decision to do so. The duty of care Idea cannot appear in this case, because there is no openness or space created between Saying and meaning that would allow for the continuation of the legal Idea in question. In other words, the nature of the thing could not assert itself here.

In order to have legitimacy, the present case would need to show that the Court has justly weighed up all of the relevant law as a whole, and that the decision reached was logically reasoned. The Court applies neither analogical inference nor practical wisdom. Despite *Le Lievre v Gould* being a Court of Appeal decision, it cannot be called an important case.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid, 502.

⁵⁵⁸ *Heaven v Pender*, supra n 541 at 755.

Further, the Court's principle itself may not be called true in Dworkin's terms because it does not follow from the principles of justice, fairness or procedural due process that provide for "the best constructive interpretation of the community's legal practice."⁵⁵⁹

The final case for our consideration is arguably the most important in the series: the House of Lords decision of *Donoghue v Stevenson*. One evening in August, 1928, the appellant went with a friend to a café in Paisley, where the friend ordered for the appellant ice-cream and a bottle of ginger-beer. The shopkeeper brought the items over to the pair, opened the ginger-beer bottle and poured some of the contents over the ice-cream, which was contained in a tumbler. The ginger-beer was contained in an opaque bottle, which was sealed with a metal cap, precluding inspection until the bottle was opened and the contents poured into plain view. The appellant drank part of the mixture, and her friend then poured the remaining contents of the bottle into the tumbler. As she was doing so, a decomposed snail floated out of the bottle and into the tumbler with the ginger-beer. The appellant alleged that she became physically ill as a consequence of drinking the contaminated ginger-beer, and she brought an action in negligence against the drink's manufacturer.⁵⁶⁰

The primary question for the House of Lords was whether the appeal ought to be allowed. Their Lordships held, in a three to two majority, that the appeal should so be allowed. In particular, the Court held:

[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of

⁵⁵⁹ Hutchinson, *A Evolution and the Common Law* (2005) 72. Hutchinson discusses Dworkin, *R Law's Empire* (1986) 110.

⁵⁶⁰ *Donoghue v Stevenson* (1932) AC 562, 605 (HL).

the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.⁵⁶¹

In terms of remoteness, Lord Macmillan thought the following question to be relevant:

Can it be said that [the manufacturer] could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer?⁵⁶²

His Lordship gives the answer that “[t]he possibility of injury so arising seems...in no sense so remote as to excuse him from foreseeing it.”⁵⁶³ Lord Macmillan comments on the decision appealed from, and says he cannot believe that there is no redress in the law of England or the law of Scotland for such a case.⁵⁶⁴

However:

[i]t must always be a question of circumstances whether the carelessness amounts to negligence, and whether the injury is not too remote from the carelessness.⁵⁶⁵

In light of the dictum in *Heaven v Pender*, Lord Macmillan sees it as “a good general rule to regard responsibility as ceasing when control ceases.”⁵⁶⁶ In the present case, His Lordship regards the manufacturer's control as “remaining effective until the article reaches the consumer and the container is opened by him.”⁵⁶⁷

Importantly, Lord Atkin sets out a general principle of law relating to duty of care. His Lordship begins by observing that negligent liability is merely a species of

⁵⁶¹ Ibid, 599.

⁵⁶² Ibid, 620.

⁵⁶³ Ibid.

⁵⁶⁴ Ibid, 621.

⁵⁶⁵ Ibid, 622.

⁵⁶⁶ Ibid.

⁵⁶⁷ Ibid.

culpa, and “is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.”⁵⁶⁸ However:

acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief.⁵⁶⁹

For this reason, common law rules have arisen limiting the range of complaints possible, and the extent of their remedy. In an oft-cited passage, Lord Atkin explains his famous ‘neighbourhood principle’:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. *You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.* Who, then, in law is my neighbour? The answer seems to be – *persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question* [Emphasis added].⁵⁷⁰

When we read the italicised parts of the above passage, we can see the ‘basic idea’ that Lord Atkin is espousing. While the decision in this case is narrower than Lord Atkin’s general principle, relating as it does directly to the facts of the case, the general principle ‘stands’ as being binding on lower courts because it emanates from the House of Lords, and because it is not *obiter* (and even if it were *obiter*, the nature of the Court would ensure that it was treated as highly persuasive). In fact, as will be seen later, Lord Atkin’s ‘neighbourhood principle’ has received subsequent legitimacy at law.

Lord Atkin considers his principle to be in line with the doctrine of *Heaven v Pender*, though he says that as framed in that case, the doctrine was too wide (which is perhaps why Lord Esher subsequently narrowed the principle in *Le*

⁵⁶⁸ Ibid, 580.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

Lievre v Gould).⁵⁷¹ Lord Atkin considers that the dictum of Lord Justice Smith in *Le Lievre v Gould*, relating to the width of the *Heaven v Pender* principle:

sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.⁵⁷²

That is, the duty is owed where one ought to have the other in reasonable contemplation as being so affected (the ‘other’ being one’s neighbour in law).⁵⁷³

Lord Atkin draws particular attention to Brett M.R.’s qualification on the principle in *Heaven v Pender*, where he emphasises the necessity of the goods having to be used immediately (ie, before a reasonable opportunity of inspection exists). Lord Atkin believes that, with the addition of the ‘immediacy’ qualification, the *Heaven v Pender* dictum as explained by Lord Justice Smith in *Le Lievre v Gould* “expresses the law of England.”⁵⁷⁴

Insightfully, Lord Atkin goes on to state:

[I]t is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted.⁵⁷⁵

In discussing the established duty of care case law, Lord Atkin considers that *Langridge v Levy* “appears to add nothing of value positively or negatively to the present discussion.”⁵⁷⁶ Further, in discussing the distinction referred to in *Longmeid v Holliday* regarding things dangerous in themselves, and those that may become so due to a latent defect in construction, Lord Atkin states:

⁵⁷¹ Ibid, 581.

⁵⁷² Ibid.

⁵⁷³ Ibid, 580.

⁵⁷⁴ Ibid, 582.

⁵⁷⁵ Ibid, 584.

⁵⁷⁶ Ibid, 588.

In this respect I agree with what was said by Scrutton L.J. in *Hodge & Sons v Anglo-American Oil Co*, a case which was ultimately decided on a question of fact. 'Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf.'⁵⁷⁷

The case of *Donoghue v Stevenson* reviews and re-states the general principles of law that have developed in the duty of care case law over time. By way of the process of dialectic, the Court re-assesses the law in light of the situation at hand, and in so doing builds up a richer, clearer new dictum that is applicable not only in the present case but also to future cases. In taking a dialectical approach, Lord Atkin has brought together the particular with the general, and formulated a new principle in line with the common law Idea. He has achieved the truth of the law by preparing the way for it by creating World, or the Open, and by using an inductive process in light of the tension between the law and the facts in previous cases, weighing up the relevant law as a whole.

The legal principle, set out by Lord Atkin, may be called true in Dworkin's sense of the word, as the dictum follows from:

the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice.⁵⁷⁸

Moreover, the 'nature of the thing' (ie, the duty of care principle) asserts itself in Lord Atkin's neighbourhood principle. The nature of the Idea shows itself in Saying. His Lordship may be said to have accepted the existence of a universal order, which is both harmonious and just and, being a wise man, he has drawn upon this order to present the true Idea and formulate true law.⁵⁷⁹ As we may recall, art embodies the cosmic order, the Idea, the truth of a thing as equally in a

⁵⁷⁷ Ibid, 595-596.

⁵⁷⁸ Hutchinson, *A Evolution and the Common Law* (2005) 72. Hutchinson discusses Dworkin, *R Law's Empire* (1986) 110.

⁵⁷⁹ Perelman, *C Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (1980) 88.

judgment as in a painting. In the judgment, the Idea is the universal and constant natural law.

Aristotle's application of the true, universal order, is 'practical wisdom'. Practical wisdom occurs when judges are faced with a situation in which they must seek out, "on the basis of equity, a solution which is more just than that of the law."⁵⁸⁰ I consider the House of Lords to have applied practical wisdom in the present case. Moreover, we know that for Aquinas, natural law is by its nature completely rational, and is something that can only be understood in light of human reason.

Lords Atkin and Macmillan reason openly, questioningly and logically, which means that they create a space for the Saying of the truth of the law in the duty of care area. Due to the importance and goodness of *Donoghue v Stevenson*, the duty of care case law is always speaking to us, and it remains both open and constant in the face of future situational revision. As an important case, *Donoghue v Stevenson* alters the legal tradition as well as changes our understanding about the past legal situations. Judges who are able to master judicial reasoning and interpretation allow the past to be seen in a new light and, as we now know, such an attitude is said to be within the very best traditions of the law.

As the law develops, we are able to pull out broad, conceptual statements of legal principle, which dwell in the realm of generality but which correspond to the 'basic idea' of the rule. Their Lordships review the relevant case law and, in particular Lord Atkin, pull out of it a broad conceptual statement to cover both past and future situations (as does the Court in *Heaven v Pender*). Farrar says such far-reaching principles often epitomise the legal system's basic values or traditions. As Lord Macmillan implies when he says that he cannot believe there is no redress for such a case, the overarching common law principle sitting in the background of *Donoghue v Stevenson* is that where there is a wrong there must be a remedy. As

⁵⁸⁰ Ibid, 89.

we have seen, over-arching common law principles will often express an ethical or moral value base that has gained legitimacy at law.

The neighbourhood principle is developed in a rational manner, which gives the dictum further legitimacy, because every legal rule and practice must be justifiable on logical and rational grounds. Weber's two grounds of rationality, we may recall, are these: "a formal logical aspect based on intellectual consistency between the legal rules, principles, standards and concepts"⁵⁸¹; and "a substantive ideological or value aspect in the sense of conformity with the changing values of society."⁵⁸²

The majority's reasoning meets both of these grounds, because it is consistent with the existing legal principles, and it takes into account the changing values of society by widening the dicta to include third party purchasers. As Farrar says, the "[l]aw must be stable, yet it cannot stand still."⁵⁸³

Donoghue v Stevenson is now known, in New Zealand as well as in England, as a landmark decision. Todd observes:

Lord Atkin's statement of principle...has come to be recognised as a cornerstone of the modern law of negligence. *Donoghue v Stevenson* itself has achieved a fame which is probably unmatched by any other civil case: and the question whether the plaintiff is the defendant's "neighbour" has been asked on countless occasions during the last 70 or so years.⁵⁸⁴

In *Anns v London Borough of Merton*,⁵⁸⁵ the House of Lords sets out an explanation of how Lord Atkin's neighbourhood principle ought to be applied in the context of the developing law of negligence as a whole. Lord Wilberforce explains that there are two stages to the inquiry:

Through the trilogy of cases in this House – *Donoghue v Stevenson*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, and *Dorset Yacht Co Ltd v Home*

⁵⁸¹ Farrar, J *Introduction to Legal Method* (1977) 10. Farrar discusses Weber's views of rationality in Weber, M *Law in Economy and Society* (trans) Rheinstein, M (1954).

⁵⁸² *Ibid.*

⁵⁸³ Farrar, J *Introduction to Legal Method* (1977) 10.

⁵⁸⁴ Todd, S (ed) *The Law of Torts in New Zealand* (3rd ed) (2001) 146.

⁵⁸⁵ *Anns v London Borough of Merton* [1978] A.C. 728 (HL).

Office, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather, the question has to be approached in two stages. First, one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damage to which a breach of it may give rise.⁵⁸⁶

The *Donoghue v Stevenson* principle is of such general application that the courts do not now need to fit the changing circumstances of life into the static factual situations of the past – the principle applies to relationships of proximity between the parties, where it would be reasonably contemplated that carelessness on the part of one could cause harm to the other. (We can see that Lord Wilberforce’s dictum clearly echoes Lord Atkin’s statement about the meaning and importance of the proximity test.) The second part of the above test relates to the policy considerations that have built up over time, relating to the width and applicability of the duty of care principle, and we can see these concerns arising as early as 1837 with the case of *Langridge v Levy*.

The *Anns v London Borough of Merton* two-stage approach to the duty of care question was affirmed by the New Zealand Court of Appeal in *Connell v Odlum*,⁵⁸⁷ and has been reaffirmed in several Court of Appeal decisions since then.⁵⁸⁸ While the case of *Connell v Odlum* reformulates, to an extent, the questions being asked at each step of the inquiry, the approach comes directly from that set out in *Anns v London Borough of Merton*. As reformulated by the New Zealand Court of Appeal, an affirmative answer to the proximity stage of the inquiry does not set up a presumption of a duty of care being owed, and the second stage involves an honest

⁵⁸⁶ *Ibid*, 751-752.

⁵⁸⁷ *Connell v Odlum* [1993] 2 NZLR 257 (CA). In particular, see the dicta of Thomas J at 265.

⁵⁸⁸ *Fleming v Securities Commission* [1995] 2 NZLR 514, 526-527 (CA); *Wilson & Horton Ltd v A-G* [1997] 2 NZLR 513, 520 (CA); *Attorney-General v Prince* [1998] 1 NZLR 262, 268 (CA); *B v A-G* [1999] 2 NZLR 296, 300-301 (CA).

assessment of the policy considerations both for and against such a duty in the circumstances of the case.⁵⁸⁹ The *Connell v Odlum* approach is “now a routine approach to the duty problem.”⁵⁹⁰

We can see that the case of *Donoghue v Stevenson* created new law for subsequent courts to both follow and reformulate, and this is as it should be; for the law is not static, rather it changes with the changing norms and values of society. The Idea of the duty of care test remains recognisable and constant, while being open (*aletheia*) to revision. Had the law not developed as it did in earlier times, we would now have a very different (maybe less sophisticated, possibly less stable) duty of care test for the tort of negligence.

The result is that we now have ‘good’ case law in the duty of care area, despite the legal Idea appearing as Saying in only half of the cases reviewed above. Thus, only 50% of the cases reviewed espouse the Idea of law, the *nature* of the thing.

Langridge v Levy, *Winterbottom v Wright*, *Longmeid v Holliday* and *Le Lievre v Gould* do not meet the ‘system of rules or principles’ test in our definition of art, because they do not create World in order for the true Idea to be revealed (ie, the principle aspect of the definition) and they do not follow the system of rules required by our legal system – such as rationality, analogical inference and logical reasoning (ie, the rules aspect of the definition).

The task that remains is to discover whether the cases of *Dixon v Bell*, *George v Skivington*, *Heaven v Pender* and *Donoghue v Stevenson* meet the second test in our definition of art, that of beauty. Beauty’s function is to grant us access to Being, and in this way is a vehicle for the appearing of truth in a work. We have seen that truth appears as Saying in 50% of the cases surveyed above, but we now need to discover whether those judgments may properly be called art. Beauty

⁵⁸⁹ Todd, *supra* n 584 at 150-151.

⁵⁹⁰ *Ibid*, 150.

defines art *qua* art, and it is only where a work is beautiful that the universal Idea present in a work may shine richly, lastingly and forcefully.

Before analysing our ‘true’ cases in light of beauty, it is necessary to consider the nature of beauty itself, and how it affects us as those who experience the work.

Chapter III Beauty and Truth

III.I Beauty’s Nature and Function

Aquinas believed:

[T]he beautiful is to be defined in terms of knowledge, the good in terms of desire...The beautiful is that in which the vision of desire comes to rest: *cuius ipsa apprehension placet*.⁵⁹¹

Gadamer further explains that the beautiful “adds, beyond goodness, an orientation towards the cognitive faculty: *addit supra bonum quemdam ordinem ad vim cognoscitivam*.”⁵⁹² Thus, beauty may be called an ontological place in which our vision of desire rests, our desire being for knowledge and understanding.

Heidegger sums up eloquently and succinctly the nature of beauty, goodness and truth, thus:

What determines thinking, hence logic, and what thinking comports itself toward, is the true. What determines the character and behaviour of man, hence ethics, and what human character and behaviour comport themselves toward, is the good. What determines man’s feeling, hence aesthetics, and what feeling comports itself toward, is the beautiful. The true, the good, and the beautiful are the objects of logic, ethics, and aesthetics.⁵⁹³

Thus, Heidegger explains:

⁵⁹¹ Gadamer, H G *Truth and Method* (1979) 443. Gadamer discusses Aquinas’s views on beauty.

⁵⁹² Ibid.

⁵⁹³ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 78.

At the outset, we know in a rough sort of way that just as ‘the true’ determines our behaviour in thinking and knowing, and just as ‘the good’ determines the ethical attitude, so does ‘the beautiful’ determine the aesthetic state.⁵⁹⁴

Beauty is not only an *object* of aesthetics, it also determines the aesthetic state. Another way to describe the relationship between beauty and aesthetics is to say that beauty is the ontology for aesthetics, which is the epistemology – our experience of the beautiful in art.

The word ‘aesthetics’ relates back to the Greek word *episteme*, as do the words ‘logic’ and ‘ethics’.⁵⁹⁵ The word *episteme* can properly be translated as ‘ways and means of knowing’.⁵⁹⁶ The words *logike* and *episteme* mean together “knowledge of *logos*”.⁵⁹⁷ Logic is the knowledge that relates to thinking, as well as to the types of and rules pertaining to thought.⁵⁹⁸ Whereas, the words *ethikes* and *episteme* mean together “knowledge of *ethos*”.⁵⁹⁹ Ethical knowledge relates to the inner character of beings and the way in which that character determines our behaviour.⁶⁰⁰

Thus, we can see that the term aesthetics has a close link to those of logic and ethics. Logic and ethics both relate to the thought and feeling states of beings, as does aesthetics.⁶⁰¹ Alexander Baumgarten, in keeping with the above definitions, defines aesthetics as the “*ars pulchre cogitandi* or the ‘art of thinking beautifully’.”⁶⁰² Whereas, Heidegger understands aesthetics in a purely ethical

⁵⁹⁴ Ibid, 107.

⁵⁹⁵ Ibid, 77.

⁵⁹⁶ “Stanford Encyclopedia of Philosophy” <<http://plato.stanford.edu/entries/epistemology/>>

⁵⁹⁷ Heidegger, supra n 593 at 77.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid, 91.

⁶⁰² Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 17.

sense. He takes the word to mean “the consideration of man’s state of *feeling* in relation to the beautiful.”⁶⁰³

Thus, beauty may be summed up as the ontological space created by a work of art that both supports and enables our desire for knowledge. Our experience of beauty allows us to think beautifully, or as Gadamer puts it, to think ‘intuitively’.⁶⁰⁴ For Gadamer, “beauty is nothing but an invitation to intuition. And that is what we call a ‘work’.”⁶⁰⁵ Gadamer considers that it is because of beauty that we may call a work ‘art’.

Circularly, for Gadamer, intuition itself is something which must first be formed via the process of intuition. The intuitive process involves a conceptual progression from one thing to another, the act of intuitively building up something so it may ‘stand’ in presence for us.⁶⁰⁶ According to Gadamer, art is to be characterised as “an intuition of the world.”⁶⁰⁷ Art is intuition itself, being as it is for him a ‘world-view’, or a view on the world.⁶⁰⁸ Gadamer further sees intuition as being related to the realm of imagination.⁶⁰⁹

In order to secure Gadamer’s concept of intuition in its proper context, we must remember that the semantic fields of *logos*, *nous*, *dianoia*, *theoria* and *phronesis* all belong to the Classical conceptual world in which ‘intuition’ does its work.⁶¹⁰ The connection becomes relevant when we consider that the *status beatitudinus* can be linked back to the mystics’ vision of the heavens, the “intuitive heavenly order”.⁶¹¹ As intuition is directly related to, and is part of, the semantic fields of

⁶⁰³ Bernasconi, R, *The Question of Language in Heidegger’s History of Being* (1985) 32. Emphasis added.

⁶⁰⁴ Gadamer, supra n 602 at 161.

⁶⁰⁵ Ibid.

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid, 164.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid, 158.

⁶¹⁰ Ibid, 159.

⁶¹¹ Ibid.

order, logic, theory and knowledge, and so too is the beautiful; aesthetics being “the art of *thinking beautifully*.”⁶¹²

The above explanation of beauty’s nature shows us how closely beauty is tied to Plato’s Idea (ie, the truth), and also to the creation of the good. Take, for example, Aristotle’s illustration of the craftsman and his shoes. We know the *technes* to be a good craftsperson by the quality of her shoes, by whether they imitate the Idea of shoes (ie, by whether the shoes themselves are good). The bringing forth of Being is done through the ontological vehicle of beauty, which is in turn defined in relation to whether the work contains the essence of truth - no matter how much the work itself alters; whether it is *mimesis*. Beauty is defined in relation to the true, but it is different from the true, in the sense that beauty is experienced in the sensuous realm and is necessary to bring forth Being. Beauty and truth are interdependent phenomena.

It was Plato who first began to demand of philosophy that it should inquire in a deep way into its objects, and it was he who said that things should be understood in their universality, in terms of their very essence.⁶¹³ Plato’s reason for the need to inquire deeply into works is because of his belief that:

[it is] not single good actions, true opinions, beautiful human beings or works of art, that [are] the truth, but goodness, beauty, and truth themselves.⁶¹⁴

In *The Republic*, Socrates and Glaucon engage in a dialectic about what constitutes goodness, in relation to educating young men. Socrates says, and Glaucon agrees:

Good literature, therefore, and good music, beauty of form and good rhythm all depend on goodness of character; I don’t mean that lack of awareness of the world which we politely call “goodness”, but a mind and character truly well and fairly formed.⁶¹⁵

... ..

⁶¹² Ibid, 17. Emphasis added.

⁶¹³ Hegel, G W F *Aesthetics Lectures on Fine Art* (trans) Knox T M (1975) 21.

⁶¹⁴ Ibid.

⁶¹⁵ Plato *The Republic* (2nd ed) (eds) Jones, C A and Radice, B (trans) Lee, D (1974) 162.

The graphic arts are full of the same qualities and so are the related crafts, weaving and embroidery, architecture and the manufacture of furniture of all kinds; and the same is true of living things, animals and plants. For in all of them we find beauty and ugliness. And ugliness of form and bad rhythm and disharmony are akin to poor quality expression and character, and their opposites are akin to and represent good character and discipline.⁶¹⁶

... ..

It is not only to the poets therefore that we must issue orders requiring them to portray good character in their poems or not to write at all; we must issue similar orders to all artists and craftsmen, and prevent them portraying bad character, ill-discipline, meanness, or ugliness in pictures of living things, in sculpture, architecture, or any work of art, and if they are unable to comply they must be forbidden to practise their art among us... *We must look for artists and craftsmen capable of perceiving the real nature of what is beautiful, and then our young men...will benefit because all the works of art they see and hear influence them for good...insensibly leading them from earliest childhood into close sympathy and conformity with beauty and reason* [Emphasis added].⁶¹⁷

For Plato, beauty, truth and goodness are intrinsically connected, as well as relating to the nature of the thing itself.

For Friedrich Nietzsche, also, beauty ties back into the true. He considers that the aesthetic discipline can be directly linked to Pythagoras's universal mathematical regularity. Nietzsche uses the phrase "[e]stimates of aesthetic value"⁶¹⁸ to explain that the basis of our finding a work beautiful lies in the work's "logical, arithmetical, and geometrical lawfulness."⁶¹⁹ He says that it is our recognition of this lawfulness that elicits from us the *feeling* 'this is beautiful'.⁶²⁰

In explaining Nietzsche's views further, Heidegger explains that, underlying all pleasurable feelings elicited by a work of art, are "biological feelings of pleasure that arise when life asserts itself and survives."⁶²¹ For Nietzsche, there are logical, mathematical feelings that sit above our physiological feelings. It is these logical feelings that form the basis of all of our aesthetic feelings. Nietzsche believes that

⁶¹⁶ Ibid.

⁶¹⁷ Ibid, 162-163.

⁶¹⁸ Heidegger, supra n 593 at 120.

⁶¹⁹ Ibid.

⁶²⁰ Ibid.

⁶²¹ Ibid, 121.

we can trace the origins of aesthetic pleasure back to the very process of life itself (ie, the heavenly order), via the lawful form (ie, art).⁶²²

For the ancient Greeks “it was the heavenly order of the cosmos that presented the true vision of the beautiful.”⁶²³ Here, the Pythagorean element in the Greek view of the beautiful may be seen. Gadamer says:

*We possess in the regular movements of the heavens one of the greatest intuitions of order to be found anywhere. The periodic cycle of the year and of the months, the alternation of day and night, provide the most reliable constants for the experience of order and stand in marked contrast with the ambiguity and instability of human affairs [Emphasis added].*⁶²⁴

Human affairs, as Gadamer puts it, take place in the sensuous realm of being, and we need art to show us, as *mimesis*, the order and regularity that only occurs in the super-sensuous or cosmic realm. It is in the latter realm that the changeless Idea, our Being, dwells, but it is in the sensuous realm that we *experience* beauty, which allows us to access Being.

Gadamer describes the ancient Greek definition of the beautiful as “a universal ontological one.”⁶²⁵ For the Greeks, art and nature are discussed in the same breath, and not in opposition to each other. The work of art shows the ontological dignity of the heavenly, the divine, the cosmological order of all things.⁶²⁶

For the ancients, the connection between heavenly order and us as beings means that we strive towards the order that we once knew and for which we continue to long. Thus, the order of being is itself seen as divine, as God’s creation.⁶²⁷ Art, as *mimesis*, has its place, its function, squarely within the divine order. Beauty functions as a bridge between the two worlds. It is through beauty that we

⁶²² Ibid.

⁶²³ Gadamer, *supra* n 602 at 14.

⁶²⁴ Ibid.

⁶²⁵ Gadamer, H G *Truth and Method* (1979) 436.

⁶²⁶ Ibid.

⁶²⁷ Ibid.

experience truth by gaining access to the Open that art provides for us; we think beautifully and this is the epistemology of aesthetics.

Plato himself defines ‘beauty’ using such concepts as “measure, appropriateness and right proportions.”⁶²⁸ Similarly, Aristotle sees the elements of beauty as being “order (*taxis*), right proportions (*summetria*) and definition (*horismenon*).”⁶²⁹ For Aristotle, these elements are present in a particularly exemplary fashion in mathematics. The inextricable connection between the mathematical order and the cosmic order of the heavens means for us that the *kosmos*, which Gadamer calls “the model of all visible harmony”,⁶³⁰ can be seen as the ultimate example of beauty in the visible sphere.

In art the Idea presences because the art-form is able to express, through being Open, its true and genuine content, being as it is *mimesis* of the Idea.⁶³¹ In order to *work* as an art-form, it must also be beautiful, so that beings can understand and know the Idea on an aesthetic level. Plato was the first philosopher to show that *aletheia* is an essential element in the beautiful.⁶³² He says that goodness appears in a work of beauty and in this way the Idea is able to reveal itself in its Being.⁶³³

Aristotle says that something deserves the label ‘beautiful’ “if nothing can be added and nothing can be taken away.”⁶³⁴ What this means is that, where beauty is present in a work, we may alter the work’s content and structure by adding, subtracting and replacing information, but the central structure in art – its truth or essence – remains intact.⁶³⁵ A work of art is beautiful because, in order to be art, it

⁶²⁸ Ibid. Gadamer discusses Plato’s views on ‘beauty’.

⁶²⁹ Ibid. Gadamer discusses Aristotle’s views on ‘beauty’.

⁶³⁰ Ibid.

⁶³¹ Hegel, *supra* n 613 at 74.

⁶³² Gadamer, *supra* n 625 at 443.

⁶³³ Ibid.

⁶³⁴ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 43.

⁶³⁵ Ibid.

is necessarily *mimesis* even though its form may change. The ‘living unity’ of the work remains.

Art imitates the heavenly order in its logical form, and hence why the ancient Greeks say that where there is art (*mimesis*) there must also be beauty. It follows, too, in light of the above discussion, that where there is beauty, there must also be truth.

The gods have no problem in surrendering themselves totally to this encounter with the true world, but as we are so unruly, and our vision so clouded, we may only glance momentary at the eternal order.⁶³⁶ Once having experienced the true, we plunge back toward the earth again, leaving the true in the super-sensuous realm, retaining only a vague soul memory of our eternal Beingness.⁶³⁷

For Plato, “[t]he beautiful reveals itself in the search for the good.”⁶³⁸ The good, in manifesting itself in the perfect form, draws towards it a longing for love.⁶³⁹ The beautiful has its own radiance, and because of this our souls recognise the truth of a work, its goodness. “For beauty alone has this quality that it is what is most radiant (*ekphanestaton*) and lovable.”⁶⁴⁰ Aesthetics, as we know, works on the level of intuition, which comes from the soul – it is our souls that recognise the soul-home of the heavens and the logic inherent in the eternal order.⁶⁴¹ Beauty makes a space for us to access this part of our being through its radiance, and because our essential nature gives us an inherent love of the beautiful.

Thus, art (*mimesis*) is required to reawaken our soul memory. In Plato’s terms, we are souls who have lost our wings because we are weighed down by trivial, earthly concerns.⁶⁴² There is only one experience that will cause our wings to grow again,

⁶³⁶ Ibid, 15.

⁶³⁷ Ibid. Gadamer discusses Plato’s *Phaedrus*. See *Plato Symposium and Phaedrus* (trans) Griffith, T (1986).

⁶³⁸ Gadamer, supra n 625 at 437.

⁶³⁹ Ibid.

⁶⁴⁰ Ibid.

⁶⁴¹ Ibid.

⁶⁴² Ibid.

allowing us to ascend once more. The experience he speaks of is one “of love and the beautiful, the love *of* the beautiful.”⁶⁴³ Plato relates our experience of love and the beautiful to our spiritual perception of the beauty inherent in the heavenly and true orders of the world.⁶⁴⁴ Whenever we encounter beauty, we can be assured that the truth is not far away, and that we will encounter it – even in the midst of the disorder of earthly reality.⁶⁴⁵

In Plato’s *Phaedrus*, Socrates sets out his view of why the wings have fallen away from our souls:

Now it is for us to understand the reason why wings are lost, why they fall away from a soul. It is more or less like this...The natural property of a wing is to lift what is heavy, raising it on high, where the race of the gods lives. Of all the things to do with the body, it has the greatest share in the divine; and the divine is beautiful, wise, good, and everything of that kind. This is what the soul’s plumage mostly feeds on, what makes it grow; whereas what is ugly and bad – all the opposites – causes it to waste away and perish.⁶⁴⁶

Further, Socrates explains:

When a man sees beauty here, in this life, he is reminded of true beauty. He grows wings, and stands there fluttering them, eager to fly upwards, but unable to do so. Yet still he looks upwards, as birds do, and takes no notice of what is below; and so he is accused of being mad...Of all forms of divine possession, this is the best – and has the best origins – both for him who has it and for him who shares in it. It is this madness which the lover of beauty must experience if he is to be called a lover.⁶⁴⁷

Even though we have entered into earthly life, we still encounter beauty, for it shines forth and “we find it sparkling most brilliantly, through the medium of the most brilliant of our senses.”⁶⁴⁸

⁶⁴³ Gadamer, *supra* n 634 at 15. Emphasis added. Gadamer discusses Plato’s *Phaedrus*. See Plato *Symposium and Phaedrus* (trans) Griffith, T (1986).

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*

⁶⁴⁶ Plato *Symposium and Phaedrus* (trans) Griffith, T (1986) 122.

⁶⁴⁷ *Ibid.*, 127.

⁶⁴⁸ *Ibid.*, 128-129.

Plato tells us in his *Phaedrus* that Being dwells in the soul:

Being which really and truly is – without colour, without form, intangible, visible to reason alone, the helmsman of the soul, the being to which the category of true knowledge applies – dwells in this place. Since the mind of a god, as of any soul which cares to accept what is right for it, is fed on intellect and pure knowledge, it rejoices when it finally sees what really is. Beholding the truth, it thrives, it draws sustenance from it...⁶⁴⁹

... ..

In this journey... it sees justice itself; it sees self-control; it sees knowledge – not knowledge combined with coming-to-be, not the knowledge which varies, I take it, in the varied objects which we now describe as being, but that which truly is knowledge because it is in what truly is. It feasts its eyes, similarly, on the other things which truly are, then sinks back to the inside of heaven, and returns home.⁶⁵⁰

The soul, then, contains the memory of Being; it is the soul that engages in remembrance with *mimesis*, and beauty is the tool to awaken our soul memory of Being or the Idea. Being sees justice itself.

For Plato, beauty is experienced:

in the *sum* of all the stages of the ascent from bodies to souls to institutions to insights, as immanent to them all, and therefore no ‘looking away’ from any of them is implied.⁶⁵¹

As our love of the beautiful emanates from the soul, it may also be termed as a spiritual love. The following quote from the great cellist Pablo Casals gives credence to this point:

For the past 80 years I have started each day in the same manner. It is not a mechanical routine but something essential to my daily life. I go to the piano, and I play two preludes and fugues of Bach. I cannot think of doing otherwise. It is a sort of benediction on the house. But that is not its only meaning for me. It is a re-discovery of the world of which I have the joy of being a part. It fills me with

⁶⁴⁹ Ibid, 123-124. Here, Socrates speaks to Phaedrus.

⁶⁵⁰ Ibid, 124. Socrates again speaks to Phaedrus.

⁶⁵¹ Gadamer, H G *Dialogue and Dialectic Eight Hermeneutical Studies on Plato* (trans) Smith, P (1980) 134. Gadamer discusses Plato’s views as set out in his *Symposium*.

awareness of the wonder of life, with a feeling of the incredible marvel of being a human being...⁶⁵²

... ..

I do not think a day has passed in my life in which I have failed to look with fresh amazement at the miracle of nature...If you continue to work and to absorb the beauty in the world about you, you find that age does not necessarily mean getting old.⁶⁵³

In the above passage of Casals's, we can see connections of the kind Plato stresses between goodness, truth and love. For Plato, the true, the good and the beautiful are all aspects of the same passion – there is a unity among the trinity, all being a necessary aspect of the whole of life.⁶⁵⁴ The desire to see things in their own light, that is, in their truth, goodness and beauty, may be seen as a form of spiritual love.⁶⁵⁵

In the *Phaedrus*, Socrates puts forward his definition of love, thus:

Well, that love is some form of desire is clear to anyone. And we also know that even when they are not in love, men desire what is beautiful. ...for each of us there are two kinds of thing which rule and guide us... One is our innate desire for pleasures, the other is acquired – a capacity for judgement, an aspiration towards what is best.⁶⁵⁶

In *The Republic*, Socrates states that “to love rightly is to love what is orderly and beautiful in an educated and disciplined way.”⁶⁵⁷ Moreover, for Socrates, to love what is orderly *is* to love what is beautiful.⁶⁵⁸ To put it another way, our soul desires knowledge of the true, and what is true is also what is beautiful – hence, our love of the true is our love of the beautiful.

Plato's *Symposium* provides a further powerful analysis of the nature of love, and of its power for the soul. The *Symposium* does this by singing the praises of Eros,

⁶⁵² Gaita, R A *Common Humanity: Thinking about Love and Truth and Justice* (2002) 219.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid, 223. Gaita discusses Plato's views of 'beauty' in his *Symposium*.

⁶⁵⁵ Ibid.

⁶⁵⁶ Plato *Symposium and Phaedrus* (trans) Griffith, T (1986) 106.

⁶⁵⁷ Plato *The Republic* (2nd ed) (eds) Jones, C A and Radice, B (trans) Lee, D (1974) 164.

⁶⁵⁸ Ibid.

the god of love.⁶⁵⁹ Plato's dialogue is set in the house of Agathon, who is a dramatic poet, where there is dinner party held in Agathon's honour. The discussion turns to the topic of love, and each guest in turn is asked to make a speech in Eros's honour. The speeches of Aristophanes and Socrates, both of whom are present at the feast, are the most important for our purposes.⁶⁶⁰

In Plato's work, Aristophanes says that men have failed to comprehend the power of Eros, for if they did so, they would have already built to him the greatest of all altars and offered him the greatest of sacrifices.⁶⁶¹ Socrates says that Eros is inspirational, and that he is the god who can most readily reconnect us with our own divine Being.⁶⁶²

In the *Symposium*, Socrates tells of a meeting with a woman called Diotima, who instructs him on the true nature of Eros. He continues in his speech by quoting her views about Eros as an intermediary:

'What then might love be', I said, 'a mortal?' 'Not in the least,' she replied. 'But what is he then?' 'As I told you earlier, he is not mortal or immortal but something between.' 'What then, O Diotima?' 'A great spirit, O Socrates; for every spirit is intermediate between god and man.' 'What power does he have?' I asked. 'He interprets and conveys exchanges between gods and men, prayers and sacrifices from men to gods, and orders and gifts in return from gods to men; *being intermediate he fills in for both and serves as the bond unifying the two worlds into a whole entity*. Through him proceeds the whole art of divination and the skill of priests in sacrifice, ritual, spells, and every kind of sorcery and magic. *God does not have dealings with man directly, but through Love all association and discourse between the two are carried on, both in the waking hours and in time of sleep*' [Emphasis added].⁶⁶³

And, on wisdom and love, Socrates says:

⁶⁵⁹ Eros is the Greek god of love, in particular of homosexual love. However, Eros is also symbolic of Platonic love. He is commonly viewed as the male counterpart of Aphrodite, who is the goddess of love.

⁶⁶⁰ Plato *Symposium and Phaedrus* (trans) Griffith, T (1986).

⁶⁶¹ Ibid, 32.

⁶⁶² Ibid, 55.

⁶⁶³ Ibid, 23.

To be sure wisdom is among the most beautiful of things and Eros is love of beauty; and so Eros must be a lover of wisdom, and being a lover of wisdom he lies between wisdom and ignorance. The nature of his birth is the reason for this.⁶⁶⁴

Thus, our love of beauty is also our love of wisdom, or knowledge, and Eros is the god that unifies the world of beings with Being itself, which although is inherent in us, it remains un-accessible to us except through beauty.

Continuing on the dialogue, Diotima describes to Socrates the highest form of Eros, that of Platonic love:

It is necessary for the one proceeding in the right way toward his goal to begin, when he is young, with physical beauty, and first of all, if his guide directs him properly, to love one person and in his company to beget beautiful ideas and then to observe that the beauty in one person is related to the beauty in another. If he must pursue physical beauty, he would be very foolish not to realise that the beauty in all persons is one and the same. When he has come to this conclusion, he will become the lover of all beautiful bodies and will relax the intensity of his love for one and think the less of it as something of little account.⁶⁶⁵

... ..

Next he will realise that beauty in the soul is more precious than that in the body, so that if he meets with a person who is beautiful in his soul, even if he has little of the physical bloom of beauty, this will be enough and he will love and cherish him and beget beautiful ideas that make young men better, so that he will in turn be forced to see the beauty in morals and laws and that the beauty in them all is related.⁶⁶⁶

Mark Morford and Robert Lenardon, authors of *Classical Mythology*⁶⁶⁷, observe the following about the above passage:

This then is the Platonic Eros, a love that inspires the philosopher to deny himself in the cause of his fellow man and in the pursuit of true wisdom. Whatever the

⁶⁶⁴ Ibid. In explanation for this last statement, Eros is the son of the Resourcefulness and Poverty. Poverty took advantage of a drunk Resourcefulness when she came around begging at a party in honour of Aphrodite's birth. As he was begotten on Aphrodite's birthday, Eros became her attendant. He is not only a lover of beauty, but also by his nature he has a passion for knowledge and a love for wisdom. From his mother, he gained the traits for his reputation as a clever sorcerer, and from his father a respected sophist. See Morford, M and Lenardon, R *Classical Mythology* (3rd ed) (1985) 134.

⁶⁶⁵ Ibid, 28.

⁶⁶⁶ Ibid.

⁶⁶⁷ Morford, M and Lenardon, R *Classical Mythology* (3rd ed) (1985).

physical roots, the spiritual import is universal, kindred to the passionate love of God that pervades all serious religious devotion. Aristotle too thinks in Platonic terms when he describes his god as the unmoved mover, the final cause in the universe, who moves as a beloved moves the lover [Emphasis added].⁶⁶⁸

Socrates, in the *Symposium*, contends that those who take Eros as their inspiration, will win fame and reputation. In fact, Socrates argues that Apollo was only able to discover archery, medicine and prophecy because his learning was guided by desire and love.⁶⁶⁹ He says this is also the case with the Muses and the arts, Athene and weaving, and Zeus and the governance of the gods. Finally, Socrates states that Eros is the reason why any arguments arising among the gods are settled promptly, that is, because of their love of beauty, “there being no love of ugliness”⁶⁷⁰ among them.

As we can see, in both the *Symposium* and the *Phaedrus*, Plato speaks of beauty as a hiatus (*chorismos*) between the world of the human senses and the heavenly world of the true.⁶⁷¹ As this hiatus, beauty is a vehicle that dwells for us ontologically. Plato considers that “[t]he beautiful snatches us from the oblivion of Being and grants a view upon Being.”⁶⁷²

The ontological structure of the beautiful is that of ‘appearance’, and one in which the truth of a thing emerges in its ‘shining’.⁶⁷³ In *Truth and Method*, Gadamer connects the ontological realm of the beautiful with the ontological realm of the intelligible:

If we have described the ontological structure of the beautiful as the mode of appearance which causes things to emerge in their proportions and their outline, the same holds for the realm of the intelligible.⁶⁷⁴

⁶⁶⁸ Ibid, 136.

⁶⁶⁹ Plato, supra n 660 at 43.

⁶⁷⁰ Ibid.

⁶⁷¹ Gadamer, H G *Truth and Method* (1979) 438.

⁶⁷² Bernasconi, R, *The Question of Language in Heidegger's History of Being* (1985) 33. Bernasconi discusses Plato's views as set out in his *Phaedrus*.

⁶⁷³ Gadamer, supra n 671 at 440.

⁶⁷⁴ Ibid.

Globally speaking, things emerge in art because art is *mimesis*.

Gadamer believes that when we experience the beautiful in both art and nature, we experience a “convincing illumination of truth and harmony, which compels the admission: ‘This is true’.”⁶⁷⁵ In art (and in nature) beauty functions as a vehicle between the ideal and the real,⁶⁷⁶ and is present wherever we find the true.

Truth is “the unconcealedness of that which is as something that *is*.”⁶⁷⁷ Truth is the truth of Being, yet beauty does not occur apart from this truth. Appearance of truth in a work of art – as the setting into the work of truth– *is* beauty. Thus, beauty belongs to the happening of truth, that is, of truth’s taking its place in art.⁶⁷⁸ Beauty does not exist in the realm of pure pleasure, nor does it exist as the object or ‘end’ of art.⁶⁷⁹

Where truth sets itself into a work of art, it ‘appears’ for us. Heidegger calls this appearing ‘beauty’. He believes that, each time truth establishes itself in a work of art, a being is disclosed in a “unique and unrepeatable way”.⁶⁸⁰ Each work of art has its own particular ontology, yet each shares an objective conceptual truth. Gadamer illustrates the ‘uniqueness’ and ‘sameness’ point by giving the example of a sunset:

An enchanting sunset does not represent a case of sunsets in general. It is rather a unique sunset displaying the ‘tragedy of the heavens’. And in the realm of art above all, it is self-evident that the work of art is not experienced in its own right if it is only acknowledged as a link in a chain that leads elsewhere.⁶⁸¹

⁶⁷⁵ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 15.

⁶⁷⁶ Ibid.

⁶⁷⁷ Heidegger, M *Poetry, Language and Thought* (trans) Hofstadter A (1971) 81. Emphasis added.

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid.

⁶⁸⁰ Sallis, J (ed) *Heidegger and the Path of Thinking* (1970) 69.

⁶⁸¹ Gadamer, supra n 675 at 16.

This is because, in part, all sunsets will be different in some way, but the meaning of the sunsets, their message or Idea, is unchangeable in all cases.⁶⁸² As Aristotle says, a thing may be called beautiful if nothing can be added or taken away.

As previously stated, for Heidegger “beauty is the *appearing* of truth, ie, the disclosure of Being.”⁶⁸³ Thus, we can see that the beautiful belongs to the presencing of truth, of truth’s taking its place. Heidegger believes beauty to lie in form, because form “once took its light from Being as the *isness* of what is.”⁶⁸⁴ To me, this is another way of saying that ‘all art is *mimesis*’, and it again shows that beauty and truth – though they are separate concepts – are inextricably linked together in reality.

Plato says it is to beauty alone that the role has been given to be “the most radiant, but also the most enchanting.”⁶⁸⁵ Through its shining, beauty liberates us to be able to view Being. Beauty illuminates Being. The beautiful is a hybrid experience, in the sense that it works in the realm of the sensuous, and at the same time grants us a view upon Being.⁶⁸⁶ In this light, Heidegger observes that beauty “is both captivating and liberating.”⁶⁸⁷

According to its most proper essence, Heidegger says:

[that] the beautiful is what is most radiant and sparkling in the sensuous realm, in a way that, as such brilliance, it lets Being scintillate at the same time. Being is that to which man from the outset remains essentially bound; it is in the direction of Being that man is liberated.⁶⁸⁸

⁶⁸² Ibid.

⁶⁸³ Sallis, *supra* n 680 at 69.

⁶⁸⁴ Heidegger, *supra* n 677 at 8. Emphasis added.

⁶⁸⁵ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 196. Heidegger discusses Plato’s views in his *Phaedrus*.

⁶⁸⁶ Ibid.

⁶⁸⁷ Ibid.

⁶⁸⁸ Ibid, 196-197.

That which is the most radiant of all the ancient Greeks call *ekphanestaton*, or that which properly ‘shows’ itself.⁶⁸⁹ What comes into our view when we experience a work of art is the self-showing of the Idea. By way of the Idea, a work of art comes to be known for us as what it *is* through the radiant shining of the beautiful, and in this way art appears to us in the ontological realm as *ekphanestaton* (ie, a showing).⁶⁹⁰ We have seen that beauty truly shines, it is *eikos*.⁶⁹¹

The Idea, as such, is the absolute truth. But, in its universal form, truth has “not yet objectified universality”,⁶⁹² which means it remains un-accessible to beings. The Idea of the beautiful, on the other hand, is the Idea which is both universal Idea (ie, the true) and a configuration of individual reality.⁶⁹³

All the term Idea means, as we have seen with the Idea of truth, is the true; the Idea of the beautiful is the truth of beauty, its essence.⁶⁹⁴ Only the Idea is true. Hegel thinks that if we want to understand the beautiful in terms of its essence, we must employ conceptual thinking:

whereby the logico-metaphysical nature of the *Idea in general*, as well as of the particular *Idea of the beautiful*, enters conscious reflection.⁶⁹⁵

That is, Hegel considers we must conceptualise beauty in its abstract, absolute form in order to understand it apart from its ontological function.

Hegel thinks that we ought to come to ‘know’ things in their universality, we should be able to find their inner essence, their ‘law’. Theory is about conceiving of things in accordance with their absolute Idea.⁶⁹⁶

⁶⁸⁹ Ibid, 80.

⁶⁹⁰ Ibid.

⁶⁹¹ Gadamer, *supra* n 671 at 441.

⁶⁹² Hegel, G W F *Aesthetics Lectures on Fine Art* (trans) Knox T M (1975) 73.

⁶⁹³ Ibid, 74.

⁶⁹⁴ Ibid, 106.

⁶⁹⁵ Ibid, 22.

⁶⁹⁶ Ibid, 37.

Hegel identifies two aspects to the Idea of the beautiful. Firstly, the Idea of the beautiful has a content of its own, it has a meaning. Secondly, for Hegel, the Idea of the beautiful has an expression, an appearance or realisation, of its content. He says that both of these aspects are necessarily interrelated, so that “the external, the particular, appears exclusively as a presentation of the inner.”⁶⁹⁷

As both beauty and truth are an Idea, in essence, they could be said to be much the same. However, the true is distinct from the beautiful, because:

what is *true* is the Idea, the Idea as it is in accordance with its inherent character and universal principle, and as it is grasped as such in thought.⁶⁹⁸

Whereas beauty is also the impetus to aesthetic experience, and it exists for us in the sensuous realm – the Idea, on the other hand, dwells only in the super-sensuous realm, which is only attainable to us through *mimesis* (which is, by its nature, a beautiful imitation of the cosmic order).

Hegel says that what is ‘there’ for thinking is not the sensuous appearance of the Idea – not beauty – but only the Idea in its universal form.⁶⁹⁹ For him, beauty may be characterised “as the pure appearance of the Idea to sense.”⁷⁰⁰ I understand him to mean by this that beauty in a work invites us to think intuitively and it is through doing so that the Idea comes to stand in the light of its Being for our souls.

As we can see, truth and beauty are interdependent, because it is through the radiance of beauty that truth is illuminated in the sensuous. Without beauty, truth would remain in the super-sensuous realm, and we would have but only fleeting glimpses of its existence. Beauty, as Eros, is our medium between two worlds.

⁶⁹⁷ Ibid, 95.

⁶⁹⁸ Ibid, 111.

⁶⁹⁹ Ibid.

⁷⁰⁰ Ibid.

Hence, the need for works of art (which are necessarily beautiful), which make a clear space that supports and rekindles our view upon Being. Art is a thing that is capable of bringing to the fore Being most richly, lastingly and forcefully, and according to Plato it does this because art is beautiful.⁷⁰¹ Beauty liberates us to Being or the Idea by radiating light through and in its appearance, so that Being can stand in a clearing of light and be remembered.⁷⁰² It is because art is beautiful that it creates for us the Open or the World, in which the Idea appears.

Yet, it is both truth and beauty that bring about the unveiling of Being for beings, as both are related to Being, and both belong together in Being, for Being *is* truth. In this way, truth and beauty “belong together in one, the one thing that is decisive: to open Being and to keep it open.”⁷⁰³

However, in the earthly realm of beings, truth and beauty must be treated as separate phenomena. This is because the openness of truth, Being, is non-sensuous illumination.⁷⁰⁴ As stated above, Plato calls Being non-sensuous, and it is for this reason that it needs beauty’s radiance in order for truth to appear.⁷⁰⁵ The opening up of Being must occur in the clearing, that is at the site where non-Being occurs, or in the midst of beings.⁷⁰⁶ To be sure, the Idea dwells above the order of being itself, and the Idea is something that is constant in itself. Yet, the beautiful both magnifies and removes the contrast between the Idea and its appearance in the thing itself.⁷⁰⁷

To be clear, the radiance inherent in beauty is not a light that is shed on a work of art from outside itself, rather it is the very nature of art-work to be radiant.⁷⁰⁸ Radiance is how art presents itself, and it is an inherent part of beauty’s actual

⁷⁰¹ Heidegger, *supra* n 685 at 195.

⁷⁰² *Ibid.*, 198.

⁷⁰³ *Ibid.*

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.*

⁷⁰⁶ *Ibid.*

⁷⁰⁷ Gadamer, H G *Truth and Method* (1979) 444.

⁷⁰⁸ *Ibid.*, 443.

being. Beauty's radiance represents the exactness of universal harmony.⁷⁰⁹ Plato describes the beautiful as something that 'shines forth' clearly, thereby drawing us (because we love it) to itself. In Plato's view, beauty is "the very visibility of the ideal."⁷¹⁰

'To shine' on an object means to make that object, on which light falls, appear for us. Beauty, however, has the mode of being of light in that it shines from *within itself*.⁷¹¹ Without light, nothing beautiful can shine, or appear; with light, a beautiful thing appears in *its* radiance – it makes itself manifest for us. In making itself manifest, beauty 'shows' us truth. In fact, "it is the universal mode of the being of light to be reflected in itself in this way."⁷¹²

There is another and equally important dimension to the light that beauty emanates. Beauty's light is not merely the realm of the visible, and it is not the light of the sun. Beauty's light is also the light of the intelligible, it is the light of the mind (*nous*).⁷¹³ It is from Plato's profound work on *aletheia* and beauty that Aristotle developed his doctrine of *nous* and, subsequently, the Christians developed their view of the *intellectus agens*.⁷¹⁴ Gadamer philosophises in relation to the ontology of beauty:

The mind that unfolds from within itself the multiplicity of what is thought, is present to itself in what is thought.⁷¹⁵

In summary, it is through beauty that the image of our essence comes into presence and we may view 'the true'. It is that upon which we bestow what Kant calls

⁷⁰⁹ Ibid, 438.

⁷¹⁰ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 15.

⁷¹¹ Gadamer, supra n 707 at 439.

⁷¹² Ibid.

⁷¹³ Ibid.

⁷¹⁴ Ibid, 440.

⁷¹⁵ Gadamer, supra n 707 at 440.

‘unconstrained favour’, and we do this intuitively in recognition of our essential nature.⁷¹⁶

Kant also considers that we ought to bestow unconstrained favour on the beautiful. For him, the beautiful is that which “purely and simply pleases.”⁷¹⁷ Kant further defines the beautiful in his work *The Critique of Judgement*⁷¹⁸ as an object of ‘sheer delight’.⁷¹⁹ Sheer delight, can be best described as a process in which the beautiful opens up to us *as* beautiful; it is, in Kantian terminology “devoid of interest”.⁷²⁰ Kant states:

Taste is the capacity to judge an object or mode of representation by means of delight or revulsion, *devoid of all interest*. The object of such delight is called *beautiful*.⁷²¹

What does ‘devoid of all interest’ mean in real terms? Why must his view of delight be ‘disinterested’? The word ‘interest’ derives from the Latin *mihi interest*, meaning that something is important to me.⁷²² Heidegger suggests that when we take an interest in something it means we want to own it, to possess it for ourselves, so that we can control the use of it.⁷²³ So, whatever we can properly call beautiful - when we can look and say ‘this is truly beautiful’, that thing can never be an interest because we cannot control it.⁷²⁴ Put another way, in order for us to find a thing beautiful, and have that aesthetic experience of it, we must let it encounter us as purely itself; it must be free to appear to us in its own way.⁷²⁵ For

⁷¹⁶ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 112. Heidegger discusses Kant’s doctrine of the beautiful, as set out in Kant, I *The Critique of Judgement* (trans) Meredith, J (1952).

⁷¹⁷ Ibid, 108.

⁷¹⁸ Kant, I *The Critique of Judgement* (trans) Meredith, J (1952).

⁷¹⁹ Heidegger, supra n 716 at 112.

⁷²⁰ Ibid, 108.

⁷²¹ Ibid. Heidegger quotes Kant, I *The Critique of Judgement* (trans) Meredith, J (1952) 16. Emphasis original in Heidegger’s work.

⁷²² Ibid, 109.

⁷²³ Ibid.

⁷²⁴ Ibid.

⁷²⁵ Ibid.

Gadamer, also, beauty in both art and nature serves to “give pleasure without any interest being involved.”⁷²⁶

Heidegger says of something that is beautiful:

We may not take it into account in advance with a view to something else, our goals and intentions, our possible enjoyment and advantage.⁷²⁷

When Kant says we should practice ‘unconstrained favouring’, he means that we must freely allow that which encounters us to be as it is in its *own* way; we must freely allow the thing to show us what belongs to it, and thus it will bring its essence to us.⁷²⁸

Gadamer says that it was Kant who first considered our experience of art and beauty as a philosophical question to be investigated.⁷²⁹ Kant is concerned with the question of how an experience of the beautiful can affect us in an objective or universal way, and not merely as a matter of subjective, individual taste.⁷³⁰ In this way, the object comes forth in its presencing as the essence of what it is, in its purity.⁷³¹ Such coming forth in appearance we call beautiful, and this is why Heidegger says that the word beautiful means “appearing in the radiance of such coming to the fore.”⁷³² ‘Being present’ belongs to the being of the beautiful itself, because even though beauty reflects the Idea or Being, as something supra-terrestrial, the experience of beauty is a physical one and happens in the sensuous realm.⁷³³

⁷²⁶ Gadamer, supra n 707 at 437.

⁷²⁷ Heidegger, supra n 716 at 109.

⁷²⁸ Ibid. Heidegger discusses Kant’s doctrine of the beautiful, as set out in Kant, I *The Critique of Judgement* (trans) Meredith, J (1952).

⁷²⁹ Gadamer, supra n 710 at 18.

⁷³⁰ Ibid. Gadamer discusses Kant’s views about beauty.

⁷³¹ Heidegger, supra n 716 at 110.

⁷³² Ibid.

⁷³³ Gadamer, supra n 707 at 438.

By saying that Beings experience the beauty of art in a sensuous way, we mean through the senses of feeling, intuition and imagination. These senses dwell in the soul.⁷³⁴ The beautiful captivates us, it advances upon us in a direct and overwhelming manner.⁷³⁵ The beautiful, being the most radiant and that which “most brightly glistens”,⁷³⁶ shines in the realm of the sensuous as “the most luminous mode of perception at our disposal.”⁷³⁷ Vision, via the eyes but through the soul, is the best way for us to apprehend Being. The beautiful allows us as beings to apprehend Being through the sensuous, that is, through the bodily state of feeling.⁷³⁸

Gadamer states that through referring to ancient thought we can see that in the beauty of art we encounter a significance that transcends all conceptual thought.⁷³⁹ How does this transcendence occur? Baumgarten speaks of a *cognitio sensitiva* or ‘sensuous knowledge’.⁷⁴⁰ *Cognitio sensitiva* means that the apparent particularity of sensuous experience we have when engaged with a work compels us to dwell on it, engage with it and experience it. Out of that interaction, in the spiritual realm, we will come to know the Being of that particular work of art, not merely its outward appearance.⁷⁴¹

In analysing Johann Goethe’s statement that “[t]he supreme principle of antiquity was the *significant*, but the supreme result of a successful *treatment* was the *beautiful*”,⁷⁴² Kant says there are two things about what it implies for art that are worth noting. Firstly, the content of art, the thing itself; and, secondly, art’s manner and mode of presentation.⁷⁴³ When considering a work of art, we start off with what the work immediately presents to us, and then we ask what its meaning or

⁷³⁴ Hegel, G W F *Aesthetics Lectures on Fine Art* (trans) Knox, T M (1975) 5.

⁷³⁵ Heidegger, supra n 716 at 196.

⁷³⁶ Ibid, 197.

⁷³⁷ Ibid.

⁷³⁸ Ibid.

⁷³⁹ Gadamer, supra n 710 at 16.

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid.

⁷⁴² Hegel, supra n 734 at 19.

⁷⁴³ Ibid.

content is - after first taking in the work's sensuousness. Hegel says that a work's external appearance has:

no immediate value for us; we assume behind it something inward, a meaning whereby the external appearance is endowed with the spirit.⁷⁴⁴

It is to the soul that the external appearance points.⁷⁴⁵

Everything we perceive of and experience as beautiful gives us access to a higher sphere, so that we may access the spiritual realm.⁷⁴⁶ According to Hegel, it is in this sense:

[that] the beauty of nature appears only as a reflection of the beauty that belongs to spirit, as an imperfect incomplete mode [of beauty], a mode which in its *substance* is contained in the spirit itself."⁷⁴⁷

Put another way, a work of art does not present what it *is*, its essence, in the external appearance. Rather, it presents its *isness* as truth, which we access via the sensuous as opposed to the mental sphere.⁷⁴⁸ Hegel uses the analogy of a fable, the meaning of which dwells in its underlying message, to show us that it is not the actual fable or art-work in which its essence presences, rather it is in its message.⁷⁴⁹ And, it is beauty that creates for us an experience of the truth of a work via our intuition, via sensuous knowledge.

Hegel describes the beautiful in art as the "the sensuous showing of the Idea."⁷⁵⁰ The Idea, which beings can only glimpse from afar, dwelling as it does in the super-sensuous realm, shows itself in the sensuous appearance of the beautiful.⁷⁵¹

⁷⁴⁴ Ibid.

⁷⁴⁵ Ibid.

⁷⁴⁶ Ibid, 2.

⁷⁴⁷ Ibid.

⁷⁴⁸ Ibid, 19.

⁷⁴⁹ Ibid.

⁷⁵⁰ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 33. Gadamer discusses Hegel's work in *Aesthetics Lectures on Fine Art* (trans) Knox, T M (1975).

⁷⁵¹ Ibid.

Interestingly, Gadamer calls Hegel's work on beauty in art, "a bold revival of Plato's insight into the unity of the good and the beautiful."⁷⁵²

For Hegel, when a work of art presents itself for our sensuous apprehension, it elicits sensuous feeling and sensuous intuition.⁷⁵³ However, the work of art is not *only* there for our sensuous apprehension, because:

its standing is of such a kind that, though sensuous, it is essentially at the same time for *spiritual* apprehension; the spirit is meant to be affected by it and to find some satisfaction in it.⁷⁵⁴

The sensuous element only exists for us in a work of art to the extent that it exists for the human spirit, regardless of the art-work dwelling independently and sensuously. The fact that sensuousness is there for beings can only come from our connection to the spirit. Thus, sensuousness itself is an aspect of, and directly related to, the spiritual realm.⁷⁵⁵

In *Aesthetics: Lectures on Fine Art*,⁷⁵⁶ Hegel says that thought is *embodied* in the beauty of art, which means that the material within a work exists for us of its own accord, and it is not determined by *external* thought.⁷⁵⁷ Our encounter with art comes from the naturalness within us, the sensuous and the heart, and in this way we come to experience the truth and harmony inherent in the work itself – we are "elevated to spiritual universality".⁷⁵⁸

Thus, we have seen that beauty, as an object of aesthetics, is defined in relation to knowledge itself. Beauty defines art *qua* art, the work of art itself being an invitation to intuition, which dwells in the soul and gives us a view on the world. Intuition is related to the mystics' vision of the heavens and is part of the semantic

⁷⁵² Ibid, 37.

⁷⁵³ Hegel, G W F *Aesthetics Lectures on Fine Art* (trans) Knox, T M (1975) 35.

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid, 36.

⁷⁵⁶ Hegel, G W F *Aesthetics Lectures on Fine Art* (trans) Knox, T M (1975) 35.

⁷⁵⁷ Ibid, 60.

⁷⁵⁸ Ibid.

fields of order, logic and knowledge. Thus, we can see that beauty is closely related to the true. Our love of beauty allows us access to Being, which dwells in the soul, and it is Eros that inspires us to reconnect with our divine truth.

Beauty is a bridge between the sensuous realm and the realm of the Idea; beauty is the ontology in which we experience aesthetic understanding or intuitive thinking. Beauty grants us a view upon Being by radiating in non-sensuous illumination, so that we can see the *isness* of a work. Through *cognitio sensitiva* we come to know the truth of a thing (that which Aristotle calls ‘the nature of a thing’), not merely its outward appearance. Finally, we see that beauty may be described as the sensuous showing of the Idea, and that where there is truth there is beauty also. Another way to say this is that art is *mimesis*, imitation of the beautiful order of the cosmos, so whatever we may properly call beautiful must also be truthful and artful, and whatever we may properly call art *must* also be both beautiful and true.

Before providing an analysis of the duty of care case law in order to see whether it may be called beautiful in light of the above discussion, another matter regarding aesthetics must be considered: Nietzsche’s philosophy of rapture and his views on our love of the beautiful. Nietzsche’s work on aesthetics is set out separately below because of the divergence of his views about truth and the importance of art from those of Plato. I will look briefly at the differences in each philosopher’s theory, and sum up with a possible explanation for this, so as to proceed with some consistency (or at least, explainable inconsistency) between them.

III.II Nietzsche on Platonism and Aesthetics

Heidegger says that for Nietzsche, in agreement with Plato, “[h]owever fleeting its *epiphanes* may be, art is reminiscent of stable Being, the eternal, constant, permanent *ideai*.”⁷⁵⁹ While Nietzsche appears to skirt around the question of truth

⁷⁵⁹ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 237.

proper in his seminal work *The Will to Power*,⁷⁶⁰ he nevertheless talks of Being in the same sense as Plato does.⁷⁶¹ For Nietzsche, art is “that Being which wills itself by willing to be Becoming.”⁷⁶² For Nietzsche, Becoming is the way in which a being wills itself back to Being.

Thus, when Nietzsche proclaims that ‘God is dead’, he is not saying it because he does not believe in the super-sensuous realm. Rather, Heidegger considers the phrase to be a statement of Nietzsche’s formula for sensuous experience, and says that it helps us make sense of his philosophy of inverted Platonism.⁷⁶³ In Nietzsche’s theory of inverted Platonism, the sensuous becomes being proper, ie, the true; for him, the true becomes the sensuous.⁷⁶⁴ In opposition to Plato, Nietzsche says only the sensuous is true, it is the only true realm.⁷⁶⁵

Nietzsche says:

My philosophy an *inverted Platonism*: the farther removed from true being, the purer, the finer, the better it is. Living in semblance as goal.⁷⁶⁶

For Nietzsche art is worth more than truth, because art occurs in the sensuous – we can feel it, experience it and be changed by it.⁷⁶⁷

What Nietzsche means when he says that art is of more value than truth is that art, as something sensuous, is more real for beings, more connected to beings, than is the super-sensuous truth of which Plato speaks.⁷⁶⁸ Plato views the super-sensuous as being of higher value than art, but Nietzsche sees that art is more valuable

⁷⁶⁰ Nietzsche, F *The Will to Power* (trans) Kaufmann, W and Hollingdale, R (1967).

⁷⁶¹ Heidegger, supra n 759 at 237.

⁷⁶² Ibid, 218.

⁷⁶³ Ibid, 154.

⁷⁶⁴ Ibid.

⁷⁶⁵ Ibid, 148.

⁷⁶⁶ Ibid, 153-154.

⁷⁶⁷ Ibid, 149.

⁷⁶⁸ Ibid, 140.

because it occurs more in *being*.⁷⁶⁹ For him the value of a thing is measured by its ability to contribute to and enhance the actuality of beings in the world. Thus, art is the being that is most *in being*, and becomes for him “the basic occurrence within beings as a whole.”⁷⁷⁰

For Plato, the Idea dwells in the super-sensuous; it is the true, our true Being. To invert Platonism means to turn upside-down the standard relation so it becomes its opposite:

[W]hat languishes below in Platonism, as it were, and would be measured against the super-sensuous, must now be put on top; by way of reversal, the super-sensuous must now be placed in its service.⁷⁷¹

Overturning Platonism for Nietzsche means that he does not view the super-sensuous as pre-eminent, it is no longer the ideal. According to Heidegger, Nietzsche’s reasoning is that “[b]eings, being what they are, may not be despised on the basis of what should and ought to be.”⁷⁷² In saying this, Nietzsche poses the question of what does being itself mean? For, if we take away our Being-ness - what we *are* in essence, then what are we exactly? Not only that, but his view opens up the questions of what we should strive for, and from whence do we gain knowledge. And, even, what *is* knowledge? His answer is that beings are sensuous, and as such we ought to liberate ourselves from trying to attain something that for him is unreal.⁷⁷³ Yet, Heidegger maintains that, for Nietzsche, “the true is to be attained on the path of knowledge.”⁷⁷⁴ Even in inversion, Nietzsche shares his normative view with Plato, that truth is grasped on the path of knowledge.

What is different, however, is that for Nietzsche the true is the sensuous. Art is created out of the sensuous realm, for the sensuous and the truth lie within

⁷⁶⁹ Ibid.

⁷⁷⁰ Ibid.

⁷⁷¹ Ibid, 154.

⁷⁷² Ibid, 160.

⁷⁷³ Ibid.

⁷⁷⁴ Ibid.

themselves, within *beings* themselves but not as the super-sensuous.⁷⁷⁵ For Nietzsche:

[a]rt and truth, creating and knowing, meet one another in the single guiding perspective of the rescue and configuration of the sensuous.⁷⁷⁶

Confusingly, Heidegger says in *The Will to Power as Art* that for Nietzsche art is “yes-saying to the sensuous, to semblance, or what is *not* ‘the true’ world.”⁷⁷⁷ So, does that mean that for Nietzsche art is affirmation of the un-true world, or that which is un-true? As, in Nietzschean terms, the truth means true beings, or beings proper. For Nietzsche, that art is “the will to semblance as the sensuous.”⁷⁷⁸ But, concerning the will to semblance, Nietzsche says:

The will to *semblance*, to illusion, to deception, to Becoming and change is deeper, more ‘metaphysical’, than the will to *truth*, to reality, to Being.⁷⁷⁹

The true is still meant here in a Platonic sense, as the Idea, the Being of beings, or the super-sensuous. For Nietzsche it is the will to the sensuous that is metaphysical, and that metaphysical will is actual in art – hence art being worth more to him than truth.⁷⁸⁰ In contrast, the Platonic will to true beings, as Being, is a ‘no-saying’ to the physical world of beings, and it is our present world in which art makes its home.⁷⁸¹ The world in which beings dwell is the true world for Nietzsche, hence he declares with respect to the relation of art and truth that “art is *worth more* than truth”.⁷⁸² Thus, his inversion of Platonism means that the sensuous must stand higher than the super-sensuous, simply because it is more genuine.

Heidegger asks, of Nietzsche’s philosophy on art:

⁷⁷⁵ Ibid, 161.

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid, 74. Emphasis added.

⁷⁷⁸ Ibid.

⁷⁷⁹ Ibid.

⁷⁸⁰ Ibid.

⁷⁸¹ Ibid.

⁷⁸² Ibid.

Yet what does 'Being' mean, if the sensuous can be said to be more in being? What does 'sensuous' mean here? What does it have to do with 'truth'? How can it be even higher in value than truth? What does 'truth' mean here? How does Nietzsche define its essence?⁷⁸³

His answer is that "all this is obscure."⁷⁸⁴ He does not see any way in which Nietzsche's statement 'art is worth more than truth' can be grounded in philosophy.⁷⁸⁵

We know that both truth and beauty are related to Being, by way of the disclosing of the Being of beings. Truth, as the super-sensuous, is revealed through beauty, in the sensuous. Being becomes liberated for beings.⁷⁸⁶ Heidegger considers:

If beauty and truth in Nietzsche's view enter into discordance, they must previously belong together in one. That one can only be Being and the relation to Being.⁷⁸⁷

One aspect of Nietzsche's theory on art may shed some light. He says that art must be grasped in terms of the artist, and not its recipients. He sees art, as sensuous creation, from the point of view of the creator. In this way, the art-work *is* created out of the sensuous, as it comes from and through the artist.⁷⁸⁸ However, what he doesn't appear to properly address is the effect of art on beings, or the content of art proper. Nietzsche seems to be process driven when it comes to art, and his view is very much grounded in the physical as opposed to the spiritual. For Nietzsche, "[b]elief in the body is more fundamental than belief in the *soul*."⁷⁸⁹

He says that art is essentially an aesthetic state, which comes to presence in being and from which emerges a state proper to beings. Put another way:

⁷⁸³ Ibid, 140.

⁷⁸⁴ Ibid.

⁷⁸⁵ Ibid.

⁷⁸⁶ Ibid, 200.

⁷⁸⁷ Ibid.

⁷⁸⁸ Ibid, 70.

⁷⁸⁹ Ibid, 138.

Art belongs to a realm where we find ourselves - we are the very realm. Art does not belong to regions which we ourselves are not, and which therefore remain foreign to us, regions such as nature.⁷⁹⁰

In this way, Nietzsche says, “[w]e have *art* in order *not to perish from the truth*.”⁷⁹¹ Yet, it is *art’s* value Nietzsche is concerned with, not that of the *Idea*.⁷⁹² He measures the value of a thing by the ways in which it enhances the actuality of beings, which for him is the truth. Art is more valuable than truth because art is more ‘in being’ than the super-sensuous realm.⁷⁹³

For Nietzsche:

Whatever philosophical standpoint one may adopt today, from every point of view the *erroneousness* of the world in which we think we live is the surest and firmest fact that we can lay eyes on.⁷⁹⁴

Art, for Nietzsche is creation, as it dwells in the sensuous. Creation is in turn related to beauty. Truth, on the other hand, is related to knowledge. Thus, there is for Nietzsche a discordance between art and truth that arouses dread.⁷⁹⁵ Unlike in Nietzsche’s philosophy on art and truth, there is no such discordance in Platonism (though, there does exist a necessary distance between the Idea and the Real).⁷⁹⁶

Heidegger believes that the distance found in Plato’s works between art and truth is actually fortuitous for Plato’s philosophy, in the sense that once art establishes World, beings engage with Being in a spiritual concordance.⁷⁹⁷ In this way, we can see that for Plato the distance is capable of resolution through art, but for Nietzsche

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid, 75.

⁷⁹² Ibid.

⁷⁹³ Ibid, 140.

⁷⁹⁴ Wilcox, J *Truth and Value in Nietzsche: A Study of his Metaethics and Epistemology* (1974) 164.

⁷⁹⁵ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 153.

⁷⁹⁶ Ibid, 188.

⁷⁹⁷ Bernasconi, R, *The Question of Language in Heidegger’s History of Being* (1985) 33.

it becomes a discordance that arouses dread because he sees truth as existing in the sensuous.⁷⁹⁸

For Plato, the distance between truth and beauty arises because, when we consider that art brings forth the beautiful and allows truth to shine in its sensuousness, we can see that the realm of truth and the realm of beauty are in fact far apart.⁷⁹⁹ Yet, it is also correct to say that truth and beauty belong together in one, they are inextricably linked together for beings.⁸⁰⁰ Beauty elevates beings beyond the sensuous, and allows us to enter into the true. In this way, accord prevails in the distance between the two because the beautiful, “as radiant and sensuous, has in advance sheltered its essence in the truth of Being as super-sensuous.”⁸⁰¹

Plato speaks, in *The Republic*, of “an ancient quarrel between philosophy and poetry”,⁸⁰² which is to say, a quarrel between “knowledge and art, truth and beauty.”⁸⁰³ However, this is not a discordance in the sense that Nietzsche uses the word, rather the quarrel relates more to the distance between fundamental opposites.⁸⁰⁴

James Wilcox, in his book *Truth and Value in Nietzsche: A Study of his Metaethics and Epistemology*,⁸⁰⁵ analyses Nietzsche’s philosophical premise:

Only the true has value.
 Only the nonhuman (transcendent, ‘absolute’, non-perspectival) is true.
 Nothing we believe is nonhuman.
 Therefore, nothing we believe has value.⁸⁰⁶

⁷⁹⁸ Ibid.

⁷⁹⁹ Heidegger, supra n 795 at 198.

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid.

⁸⁰² Ibid, 190. Heidegger quotes Plato *The Republic* (2nd ed) (eds) Jones, C A and Radice, B (trans) Lee, D (1974) 607.

⁸⁰³ Ibid, 190.

⁸⁰⁴ Ibid.

⁸⁰⁵ Wilcox, J *Truth and Value in Nietzsche: A Study of his Metaethics and Epistemology* (1974) 164.

⁸⁰⁶ Ibid.

Wilcox says that Nietzsche's reasoning is formally valid, in that the conclusion follows from the premises.⁸⁰⁷ The only way to avoid the conclusion of Nietzsche's nihilism would be to reject one or more of his premises. Wilcox describes the first two premises as "sources of modern intellectual despair",⁸⁰⁸ in that they require of reason something that reason is unable to provide:

a truth which reason does not itself create; and then they condemn reason for its failure to live up to the demand.⁸⁰⁹

Wilcox believes the third premise to be merely a formulation of Nietzsche's own skepticism, and that Nietzsche appears to regard it as his only tenable option.⁸¹⁰

For my part, I consider that Nietzsche's take on truth is understandable, given that he views art from the perspective of the artist. However, I also agree with Heidegger that his philosophy on truth and Being is obscure. There is another important aspect to Nietzsche's philosophy of aesthetics that may assist us in understanding why he values art above truth (reality above concept), and that is his theory of 'the grand style'.

As mentioned above, Nietzsche views Becoming is an active will to Being. He calls our active will to Being 'the grand style'.⁸¹¹ The grand style is in Nietzsche's view "the whole of artistic actuality".⁸¹² Through the grand style, art comes into its essence. For Nietzsche, "[t]hree good things are proper to art: elegance, logic, beauty; along with something even better: the grand style."⁸¹³ What is the grand style?

⁸⁰⁷ Ibid.

⁸⁰⁸ Ibid.

⁸⁰⁹ Ibid, 165.

⁸¹⁰ Ibid, 164.

⁸¹¹ Heidegger, *supra* n 795 at 135.

⁸¹² Ibid, 124.

⁸¹³ Ibid.

The grand style consists in contempt for trivial and brief beauty; it is a sense for what is rare and what lasts long.⁸¹⁴

Nietzsche's aesthetics examines the state of creation, and enjoyment, of art. His aesthetics is physiological, and involves that which is at furthest remove from the spiritual realm (and from the spirituality in the work itself).⁸¹⁵ Heidegger says that, for Nietzsche:

[t]he aesthetic state is the one which places itself under the law of the grand style which is taking root in it. The aesthetic state itself is truly what it is only as the grand style.⁸¹⁶

Nietzsche believes that art, in the proper sense of the word, is art in the grand style; that is, art desires to bring life itself to power with "perspectival shining and letting shine."⁸¹⁷ Art is both liberating and clarifying with a view to transforming the sensuous in two ways: firstly, it sets up a thing in the light of Being; and secondly, it shows the thing in such clarity as to illuminate the light of life itself.⁸¹⁸

Nietzsche interprets the Being of beings as 'will to power' and, according to Heidegger, Nietzsche considers art to be "the supreme configuration of will to power."⁸¹⁹ Hence, another possible reason for Nietzsche viewing art as higher than truth itself, more *in being* than the super-sensuous realm.

The will to power "releases all things to their essence and their own bounds."⁸²⁰ Nietzsche's view of art as "the greatest stimulant of life"⁸²¹ means simply that art is an arrangement of will to power.⁸²²

⁸¹⁴ Ibid, 124-125.

⁸¹⁵ Ibid, 129.

⁸¹⁶ Ibid.

⁸¹⁷ Ibid, 216.

⁸¹⁸ Ibid.

⁸¹⁹ Ibid, 135.

⁸²⁰ Ibid, 137.

⁸²¹ Ibid, 76. Heidegger quotes Nietzsche, *F The Will to Power* (trans) Kaufmann, W and Hollingdale, R (1967) 808.

⁸²² Heidegger, *supra* n 795 at 76.

A stimulant is that which propels forward or advances something, it lifts something beyond itself, thus increasing its power.⁸²³ Heidegger says that for Nietzsche a stimulant is something that “conducts one into the sphere of command of the grand style.”⁸²⁴ Nietzsche views the word stimulant as meaning power itself; that is, art is ‘will to power’.⁸²⁵

Art is the countermovement to the nihilism that Nietzsche considers exists, and it is also a state of rapture as an object of physiology.⁸²⁶ (By physiology, Nietzsche means physics in a broad sense.) Art may also be seen as an object of metaphysics. All of these factors are inclusive of each other for Nietzsche.⁸²⁷

In the Platonic view, our grasp of the Idea in any given work is grounded upon *Eros*, which in Nietzsche’s philosophy of aesthetics equates to his term ‘rapture’.⁸²⁸ Nietzsche’s formula for human greatness is *amor fati*, which means:

that one wants nothing to be different, not forward, not backward, not in all eternity. Not merely bear what is necessary, still less conceal it – all idealism is mendaciousness in the face of what is necessary – but *love* it.⁸²⁹

In Nietzsche’s conception of art, there are two important basic determinations: rapture and beauty. Rapture and beauty are inextricably linked: “[r]apture is the basic mood; beauty does the attuning.”⁸³⁰ In Nietzsche’s aesthetics, rapture and beauty determine his entire aesthetic state in that they convey what opens itself up in that state, and what pervades it.⁸³¹ Rapture and beauty are related in that beauty is *disclosed* in rapture; and, at the same time, it is beauty that moves us to the *feeling* of rapture.⁸³²

⁸²³ Allen, R (ed) *The New Penguin English Dictionary* (2000).

⁸²⁴ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 130.

⁸²⁵ *Ibid*, 76.

⁸²⁶ *Ibid*, 126.

⁸²⁷ *Ibid*.

⁸²⁸ *Ibid*, 167.

⁸²⁹ Wilcox, *supra* n 805 at 54.

⁸³⁰ Heidegger, *supra* n 824 at 123.

⁸³¹ *Ibid*.

⁸³² *Ibid*, 113.

Nietzsche says that “the effect of artworks is arousal of the art-creating state, rapture.”⁸³³ We can understand two things from Nietzsche’s statement. Firstly, that he views aesthetics from the perspective of, and in relation to, the artist.⁸³⁴ Secondly, that Nietzsche considers rapture to be the creating force of art-works; rapture is the state of creativeness that resides in the physical and psychic state of the artist.⁸³⁵ The form of an art-work allows that which we encounter in the art itself to radiate in appearance.⁸³⁶ For Nietzsche, “[g]enuine form is the only true content.”⁸³⁷

Nietzsche talks of states of feeling which, although psychical, emanate from the bodily state of being.⁸³⁸ Seen as a whole, he sets out an indissoluble unity between the corporeal-psychical, that is the living state. For Nietzsche, this corporeal-psychical state of being is where aesthetics occurs, it is our aesthetic state as well as our ‘nature’.⁸³⁹ Thus, when Nietzsche uses the term physiology to refer to the bodily state, he means it in the sense of both the physical and the psychical.⁸⁴⁰

It is through our physical and psychic states that we experience rapture. As rapture is of vital importance to Nietzsche’s theory of aesthetics, it is prudent to set out in his words what the concept means. Nietzsche explains, in *Twilight of the Idols*⁸⁴¹:

If there is to be art, if there is to be any aesthetic doing and observing, one physiological precondition is indispensable: *rapture*. Rapture must first have augmented the excitability of the entire machine: else it does not come to art. All the variously conditioned forms of rapture have the requisite force: above all, the rapture of sexual arousal, the oldest and most original form of rapture...In addition, the rapture that comes as a consequence of all great desires, all strong

⁸³³ Ibid, 117. Heidegger quotes Nietzsche, F *The Will to Power* (trans) Kaufmann, W and Hollingdale, R (1967) 821.

⁸³⁴ Ibid.

⁸³⁵ Ibid.

⁸³⁶ Ibid, 119.

⁸³⁷ Ibid, 120.

⁸³⁸ Ibid, 96.

⁸³⁹ Ibid.

⁸⁴⁰ Ibid.

⁸⁴¹ Nietzsche, F *Twilight of the Idols: and the Anti-Christ* (trans) Hollingdale, R (1968).

affects; the rapture of the feast, contest, feat of daring, victory; all extreme movement; the rapture of cruelty; rapture in destruction; rapture under certain meteorological influences, for example, the rapture of springtime; or under the influence of narcotics; finally, the rapture of will, of an overfull, teeming will.⁸⁴²

Heidegger summarises the above passage by saying that “rapture is the basic aesthetic state, a rapture which for its part is variously conditioned, released, and increased.”⁸⁴³ He believes the above passage of Nietzsche’s to be clearest and most unified explanation of his definition of the aesthetic state.⁸⁴⁴

For Nietzsche, “[w]hat is essential in rapture is the feeling of enhancement of force and plenitude.”⁸⁴⁵ Rapture is the “physiological precondition of art”,⁸⁴⁶ and what is essential about the precondition is feeling. Heidegger says:

[that] feeling means the way we find ourselves to be with ourselves, and thereby at the same time with things, with beings that we ourselves are not.⁸⁴⁷

Rapture must always be rapturous feeling, and feeling is the way that we *are*, corporeally. It is not that the body is a burden that we carry around in earthly form; we do not ‘own’ a body as such, rather we *are* bodily beings.⁸⁴⁸

Nietzsche emphasizes two main points about rapture, which he wishes for us to understand. Firstly, that rapture is a feeling of force or enhancement; secondly, that rapture involves a feeling of plenitude.⁸⁴⁹ The feeling of enhancement or force is our capacity to extend beyond ourselves as beings; it is a relation between beings in which we experience being more fully in being, as feeling richer *qua* beings.⁸⁵⁰

Enhancement may be understood in terms of a mood, an elation, that carries us

⁸⁴² Heidegger, supra n 824 at 96-97. Heidegger quotes Nietzsche, F *Twilight of the Idols: and the Anti-Christ* (trans) Hollingdale, R (1968) 122-123.

⁸⁴³ Ibid, 97.

⁸⁴⁴ Ibid.

⁸⁴⁵ Ibid, 98. Heidegger quotes Nietzsche, F *Twilight of the Idols: and the Anti-Christ* (trans) Hollingdale, R (1968) 123.

⁸⁴⁶ Ibid, 98.

⁸⁴⁷ Ibid.

⁸⁴⁸ Ibid, 99.

⁸⁴⁹ Ibid, 100.

⁸⁵⁰ Ibid.

along with it in its buoyancy. Plenitude may be understood as an attunement that is open to everything and exists in a state of responsiveness to experience.⁸⁵¹ “The mood of rapture is...an attunement in the sense of the supreme and most measured determinateness.”⁸⁵²

Heidegger says there is a third aspect of the feeling of rapture:

the reciprocal penetration of all enhancements of every ability to do and see, apprehend and address, communicate and achieve release.⁸⁵³

In *The Will to Power*, Nietzsche speaks of two states in which art emerges as a force of nature in beings, these are the Apollonian and the Dionysian.⁸⁵⁴ For Nietzsche, the Greek god Dionysus is more an epistemological concept than an actual being, which makes sense when we remember that Dionysus is the god who is passionate about sensuousness, sexuality and the physical world. Dionysus is supremely unafraid of reality as it *is*, including all of its harshness and terror.⁸⁵⁵

Nietzsche developed the distinction between the Dionysian and Apollonian states of rapture in his first treatise, *The Birth of Tragedy out of the Spirit of Music*.⁸⁵⁶ In his early work, Nietzsche distinguished between Apollonian and Dionysian rapture by saying that the former relates to our dream-state and the latter is the name for rapture itself.⁸⁵⁷ Something similar is set out in *The Will to Power as Art*, “[b]oth states are rehearsed in normal life as well, only more weakly: in dreams and in rapture.”⁸⁵⁸

⁸⁵¹ Ibid.

⁸⁵² Ibid, 113.

⁸⁵³ Ibid, 100.

⁸⁵⁴ Ibid, 97.

⁸⁵⁵ Wilcox, J *Truth and Value in Nietzsche: A Study of his Metaethics and Epistemology* (1974) 54.

Dionysus is traditionally known, in Greek mythology, as the god of vegetation – in particular, of the vine, the grape and the imbibing of wine. However, Dionysus embraces much more in terms of his earthly passions and wild spirituality. See Morford, M and Lenardon, R *Classical Mythology* (3rd ed) (1985).

⁸⁵⁶ Nietzsche, F *The Birth of Tragedy out of the Spirit of Music* (ed) Tanner, M (trans) Whiteside, S (1993).

⁸⁵⁷ Heidegger, supra n 824 at 97.

⁸⁵⁸ Nietzsche, F *The Will to Power* (trans) Kaufmann, W and Hollingdale, R (1967) 798.

While rapture is set out as being but one of two aesthetic states, Nietzsche clearly sees rapture as *the* basic aesthetic state.⁸⁵⁹ Having said that, Nietzsche tends to blur the one into the other. For example, Nietzsche states in *The Will to Power*: “In Dionysian rapture there is sexuality and voluptuousness: in the Apollonian they are not lacking.”⁸⁶⁰

For Nietzsche, the Dionysian and the Apollonian are both held out as being types of rapture; that is, they both manifest the basic aesthetic state. It is this basic aesthetic state that is fundamental to Nietzsche’s doctrine of aesthetics.⁸⁶¹ The Apollonian and Dionysian are two “forces of nature and art”,⁸⁶² and it is in the reciprocity of their relationship, that all development of future art consists.⁸⁶³

Socrates says, in Plato’s *Phaedrus*, that in ‘supernatural madness’ we will find four parts, which represent the work of four gods: Apollo, Dionysus, the Muses and Eros (Eros includes Aphrodite). Apollo provides us with inspiration, Dionysus with ecstatic madness or passion, the Muses with creativity and as for Aphrodite and Eros, they provide us with the madness of love of which erotic love is the finest.⁸⁶⁴ The reason for Socrates talking of Aphrodite and Eros in the same breath is because Eros is the male counterpart of Aphrodite, and he shares many of her characteristics. Eros and Aphrodite represent all of the facets of love and desire.⁸⁶⁵

To sum up, we can see that Nietzsche values art over truth, and perhaps this is because: form is seen as the only true content (ie, the sensuous is the true world); art is viewed as will to power (ie, the Being of beings); and aesthetics is conceptualised as applied physiology (seen predominantly from the artist’s point of view). With this knowledge, we may better understand Nietzsche’s basic position on art.

⁸⁵⁹ Heidegger, M *The Will to Power as Art* (trans) Farrell Krell, D (1979) 97.

⁸⁶⁰ Nietzsche, supra n 858 at 798.

⁸⁶¹ Heidegger, supra n 859 at 98.

⁸⁶² Ibid, 102.

⁸⁶³ Ibid.

⁸⁶⁴ Plato *Symposium and Phaedrus* (trans) Griffith, T (1986) 155.

⁸⁶⁵ Morford, M and Lenardon, R *Classical Mythology* (3rd ed) (1985) 127.

For Nietzsche, there are two main aesthetic states: rapture and beauty; although, rapture is for him pre-eminent because it is concerned with creativity and provides a feeling of enhancement and plenitude. Beauty is disclosed in rapture, and it is also beauty that transports us into rapturous feeling. Nietzsche views Apollo and Dionysus as the two forces of nature and art (ie, states of rapture).

I have set out here Nietzsche's divergent views on art and truth, and provided a brief summary of his philosophy of aesthetics, because I have discussed Nietzsche's philosophical views throughout this thesis, and because they differ in important ways from Plato's thoughts on beauty and truth.

The following chapter provides an analysis of 4 of the duty of care cases I considered earlier in light of their constancy of the Idea, with a view to determining whether they may be said to be beautiful as well as true. In doing so, I will take into account all that has been said in the present chapter about beauty and its relationship with truth.

III.III *Beautiful Case Law: Duty of Care*

This part of the thesis aims to discover whether the cases of *Dixon v Bell*, *George v Skivington*, *Heaven v Pender* and *Donoghue v Stevenson* meet the second test in our definition of art, that of beauty. We have seen that truth appears as Saying in these cases, but we now need to discover whether those judgments may properly be called art. Beauty defines art *qua* art, and it is only where a work is beautiful that the universal Idea present in a work may shine richly, lastingly and forcefully.

The first case for our consideration is *Dixon v Bell*, which laid down the general principle that, where a dangerous thing is in someone's care, that person has a duty to make it safe and unable to do mischief.⁸⁶⁶ Thus, where there is a want of care,

⁸⁶⁶ *Dixon v Bell* (1816) 105 E.R. 1023, 1024.

and the thing itself causes harm, the law will hold the defendant responsible for the consequent harm.⁸⁶⁷

In this case, Lord Ellenborough CJ recognises the natural law propositions of right and wrong, and allows them to come to the fore; that is, he allows the Idea of law to assert itself. The Court creates the Open by reasoning in a logical manner and providing space for the principle of the case to presence in Saying. Further, in applying practical wisdom, the Court provides for the application of the true, universal order in the world in a “unique and unrepeatable way”.⁸⁶⁸

The work of *Dixon v Bell* is, in my view, beautiful simply because it is *mimesis* – the judgment imitates the heavenly order by inviting the Idea of law to presence in the work. Beauty is the ontological space created by an art-work that supports and enables our desire for knowledge, and by experiencing beauty we are able to think beautifully, or intuitively. The dictum in *Dixon v Bell* invites us to think intuitively, because we are able to grasp the universal order and regularity in its principle. The *ratio* of the case awakens the universal knowledge of Being inherent in the soul, and it does so by being open, ordered and logical.

Lord Ellenborough CJ is, in my view, a good *technes*, because his work imitates the Being of the law. In my view, the judgment brings forth Being through beauty, which as we know is itself defined in relation to whether a work holds within it the essence of truth. Through the beauty in the Court’s decision, beauty radiates the true, making the principle espoused presence for us richly, lastingly and forcefully.

In order to *work* as an art-form, a judgment must be beautiful, so that beings can understand and know the Idea on an aesthetic level. *Dixon v Bell* succeeds in doing just that, and thus may be called a work of art.

⁸⁶⁷ Ibid.

⁸⁶⁸ Sallis, J (ed) *Heidegger and the Path of Thinking* (1970) 69.

The next case of *George v Skivington* espouses the principle that where a person makes an article sold for a particular purpose, and knows of the purpose for which it is bought and for whom the article is bought, he or she has a duty to that person to use ordinary care in making the article.⁸⁶⁹

George v Skivington is a good judicial text, because the law here remains both open and constant, even in the face of situational revision. The case is written with an openness and provides a space between Saying and meaning that allows the legal Idea to presence. The Court reasons logically and consistently, and the judgment may properly be called rational.

Moreover, the Court applies the universal duty of care principle to the facts of the case, and in doing so the nature of the thing asserts itself in the work. The duty of care Idea remains absolute in its essence, but is refined and tailored to do justice in the circumstances, as well as for future use. The principle in *George v Skivington* is true in the natural law sense, and in the Platonic sense of the Idea of a thing, the case revealing its truth in the clearing of the Open. It is through beauty that we experience truth by gaining access to the Open that art provides for us; we think beautifully about it, which is the epistemology of aesthetics.

The ‘living unity’ of the work is present in *George v Skivington*, and it can properly be seen as *mimesis*. The judgment creates an ontological space of beauty, in order to allow the reader to experience its essence – that is, to think beautifully about the Idea present in the work. The work does so by being logical, ordered and rational, as well as by allowing the nature of the thing to assert itself. Nietzsche believes that it is our recognition of such order and logic in a work (as imitation of the heavenly order) that elicits from us the feeling that something is beautiful.⁸⁷⁰

⁸⁶⁹ *George v Skivington* (1869) 5 L.R. 1, 3.

⁸⁷⁰ Heidegger, *supra* n 859 at 120.

We know that the appearance of truth in a work of art – as the setting into the work of truth– *is* beauty. Thus, beauty is the appearing of the Idea in a work, so wherever truth presences, beauty radiates. For the ancient Greeks, radiance is *ekphanestaton*, meaning that something properly shows itself. The Idea of law not only shows itself in *George v Skivington*, it also radiates for us ontologically through the lawful and beautiful form of the work. Without beauty, the truth of the judgment would remain in the super-sensuous realm, and be un-accessible to us as a sensuous experience. The Court in *George v Skivington* brings Being to the fore, by using beauty as a vehicle, so that it presences richly, lastingly and forcefully in the work's being. Thus, the judgment fulfils our definition of art.

In the Court of Appeal case of *Heaven v Pender*, Brett M.R. sets out a legal principle that acknowledges the universal validity of natural law; that is, the rules of right and wrong exist as 'the nature of the thing' in his dictum. The decision is fair, logical and rational, and the principle laid down by the Court may be called true in both Dworkin and Aristotlean terms.

In my view, the Court has succeeded in developing a richness, complexity and clarity around the duty of care test, for use in future cases. In engaging in dialectic, Brett M.R. resolved the tensions in prior legal texts, and has created a new richness and aptness of meaning. As we know, truth appears in the dialectic of the Open, and this allows a space for Saying – that is, for the continuation of the legal Idea or the nature of the thing.

Art imitates the heavenly order in its logical form, which is why the ancient Greeks say that where there is art (*mimesis*) there must also be beauty. *Heaven v Pender* is a beautiful case because it is *mimesis*, it is good and it is a rational and reasoned presentation of the legal Idea. Readers are able to understand and know the Idea on an aesthetic level, as I have done with the work, because the judgment is beautiful.

Gadamer believes that when we experience the beautiful in both art and nature, we experience a “convincing illumination of truth and harmony, which compels the admission: ‘This is true’.”⁸⁷¹ Upon reading *Heaven v Pender*, one ought to have that very experience of saying, intuitively, ‘this is true’. The dictum is right, ordered and universal.

Put simply, beauty is the appearing of truth; beauty belongs to the presencing of truth, even though beauty exists for us as a sensuous experience. Beauty, as Eros, is our medium between the sensuous and super-sensuous, and it calls the truth to us. *Heaven v Pender* radiates its beauty so that the Idea of the work may stand in the light and be remembered by our souls. Out of our sensuously engaging with the work, we come to know the Being of that particular judgment, and not merely its outward appearance. *Heaven v Pender* may be called beautiful, as well as true, and thus meets our definition of art.

Finally, we come to the famous case of *Donoghue v Stevenson*. The judgment expertly reviews and re-states the relevant principles of law, and engaging in dialectic, the Court builds up a richer, clearer new dictum in line with the common law Idea that stands in the Open for use in future cases. The case is orderly, logically reasoned and rationally applied.

The bringing forth of Being is done through the ontological vehicle of beauty, which is in turn defined in relation to whether the work contains the essence of truth – ie, whether it is *mimesis*. While beauty differs from the true, we know that it is defined in relation to the presence of the true, the Idea of cosmic order in a work. We are able to think beautifully when engaging with the dictum laid down in *Donoghue v Stevenson*, showing that the work is beautiful in itself.

⁸⁷¹ Gadamer, H G *The Relevance of the Beautiful and Other Essays* (ed) Bernasconi, R (trans) Walker, N (1986) 15.

The judgment is beautiful for us, not only because it makes space for the nature of the thing to presence, but also because it is logical, rational and ordered – imitating, as it does, the heavenly order of the cosmos. In recognising the inherent order in the work, we feel the work to be beautiful, and our soul aesthetically intuits the work's essence.

We know the Idea on an aesthetic level through beauty, and this is the way in which an art-form *works* as an art-form; beauty defines art *qua* art. My experience of the judgment of *Donoghue v Stevenson* compels me to say it is true, and Gadamer believes that it is by this experience of compulsion when engaging with a work that we know whether or not a work is beautiful. We may properly call *Donoghue v Stevenson* a beautiful judgment, as well as being true, and because it meets our definition of art, this is a case in which the truth of the law shines richly, lastingly and forcefully.

In summary, the cases of *Dixon v Bell*, *George v Skivington*, *Heaven v Pender* and *Donoghue v Stevenson* not only fulfil the 'system of rules and principles' portion of our definition of art, they may also be called beautiful. Thus, the above 4 cases fall within our definition of art, which means that they radiate the truth of law in a rich, lasting and forceful manner.

Case law should be able to apply and communicate the Idea of law in a rich, lasting and forceful manner because of the important social and moral function of judge-made law. It is both encouraging and, at the same time, unfortunate that a mere 4 out of the 8 cases surveyed radiate the truth of law in this manner.

Conclusion

We have seen that, where a judgment meets the definition of art, it will be successful in relaying the 'truth' of the law in a rich, lasting and forceful manner.

An important co-requisite of the test, of whether a judgment can be defined as art, is that it must also be a work of 'beauty'.

We have seen that case law should be able to apply and communicate the true principles of the law in a rich, lasting and forceful manner because of its important social and moral function. Further, the law must be taken to be always speaking, and every person must live with certainty of the substance of the law.

I have defined art as being literary works, which deal with rules and principles governing human activity, produced using skill and imagination, which require knowledge and judgement, and which are beautiful. The artistic factors of truth (the principle aspect) and beauty in a judgment have been my main focus in this thesis, although I have also considered the case law above in light of the rules aspect of our definition of art. I have taken it to be a given that all of the other aspects of the definition of art are met in relation to the judicial opinion.

Art's function has been described as conveying truth in the world. I have explored and defined the concept of truth, referring to both the ancient Greek view of the cosmic order and Aristotle's view of natural law. I have further attempted to make clear the analogy between truth as Idea (in the Greek sense) and the law as Idea (in Aristotle's natural law sense).

I have aimed to show that the legal conception of truth in a judgment, as set out in the principle of the case, is analogous to the universal Idea of truth. For completeness, I have also considered the context in which the judicial opinion is created.

I have explored several of the main cases that have developed the concept of 'duty of care' in the tort of negligence, with a view to discovering whether in this area of judicial opinion the truth or principle has remained constant throughout the case law's development. The analysis was undertaken with reference back to the

“system of rules and principles governing a particular human activity”⁸⁷² portion of our agreed definition of art.

I have further, and vitally, explored the nature and function of ‘beauty’. Beauty has been shown to be the vehicle for truth appearing in a work of art. A work must be beautiful if we are to meaningfully access the Idea. I then considered half of the cases surveyed above in light of our view of beauty, to see whether each of them may properly be called beautiful.⁸⁷³

The thesis shows that the cases of *Dixon v Bell*, *George v Skivington*, *Heaven v Pender* and *Donoghue v Stevenson* meet both of the tests of truth and beauty in our definition of art. Being both truthful and beautiful – that is, meeting our definition of art, these cases allow the universal Idea present in them to shine richly, lastingly and forcefully.

Further, we know that the cases of *Langridge v Levy*, *Winterbottom v Wright*, *Longmeid v Holliday* and *Le Lievre v Gould* do not meet the ‘system of rules and principles’ test in our definition of art, because they do not create World in order for the true Idea to be revealed (ie, the principle aspect of the definition), nor do those cases follow the system of rules required by our legal system.

The order of being is viewed by the ancient Greeks as divine, as God’s creation. Art, as *mimesis*, has its place, its function, squarely within the divine order. Beauty functions as a bridge between the two worlds. It is through beauty that we experience truth by gaining access to the Open that art provides for us. Judge-made law should facilitate our knowledge of the order of being, the very truth of our nature.

⁸⁷² See *infra* at 9.

⁸⁷³ I have not considered these cases in light of the beauty portion of the definition because, as we have seen, it is only where truth is present that the beauty of a work will radiate itself in the sensuous realm.

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