THE MODERN LAW REVIEW

Modern Law Review
DOI: 10.1111/1468-2230.12756

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Plainly Wrong

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English law and wider common law jurisprudence have endorsed the condition that an appellate court should reject a trial judge's finding of fact which it believes is 'plainly wrong'. Courts have not explained what makes a finding plainly wrong, however. Scholars have largely ignored the issue. This article draws on recent work in epistemology to provide a new analysis of the plainly wrong standard. Rationally, a court should not believe both (1) that a judge is a better fact finder and (2) that the judge was wrong to find some fact. If it does believe both, it should abandon the belief it is less confident of. So, a court should reject a judge's finding if it is more confident that it is wrong than that the judge is a better fact finder. This analysis has implications for review of administrative fact finding and for judicial deference generally.

INTRODUCTION

Much of a trial judge's work is answering factual questions: questions about 'who did what, where, when, how, and with what motive or intent'.[1] Was the fire accidental or deliberate? Was the car speeding when it hit the pedestrian? Would the baby have been brain damaged had the doctor not botched the delivery? A judge's answers to such questions are findings of fact. Since they are crucial to any case's outcome, the party unhappy with the outcome often asks an appellate court to overturn a finding of fact.

These requests place the appellate court in an awkward position. The court is asked to second-guess factual findings by someone who, on the face of it, is better positioned to make those findings. The trial judge has access to all the evidence a court has – and more. The judge sees and hears witnesses and observes demonstrations; he or she may even visit the scene. In addition, the judge is often better able to evaluate the evidence. The judge sits with a single case for weeks or months, becoming immersed in its details. The judge also develops the expertise that comes from recently making factual findings day after day, case after case. In both respects, the appellate court is at a marked disadvantage compared with the trial judge.

In light of these disadvantages, it may seem that a court should never overturn a judge's factual finding. And yet a little reflection shows that cannot be right. The judge found that the car was speeding when it turned left off Pall Mall onto St James' Street. But that must be wrong: there is no left turn off Pall Mall

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1 K.C. Davies, 'Judicial Notice' (1955) 55 *Columbia Law Review* 954, 952.

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onto St James' Street, as anyone with a map of London can establish. The judge found that acceptance of the offer to contract was communicated on Monday 31 March 1987. But 31 March 1987 was a Tuesday, as any calendar shows. Trial judges are fallible, as we all are. They err, as we all do. Some of their errors, like in these examples, demand appellate intervention.

Under what conditions, then, should a court reject a judge's finding of fact? In *Clarke* v *Edinburgh & District Tramways Co*,[2] the House of Lords was asked to overturn a trial judge's finding that the plaintiff did not cause a tram accident. Lord Shaw wrote: 'In my opinion, the duty of an appellate Court … is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong?'[3]

Less eloquently, the test is whether a trial judge's factual finding is, in the court's view, plainly wrong. If it is, then the court should reject the finding. Otherwise, the court should accept it. Today, Lord Shaw's test is still the standard by which courts in England and Scotland decide whether to overturn a trial judge's factual findings. It has been 'stated and restated in domestic and wider common law jurisprudence',[4] and endorsed many times by the House of Lords, Supreme Court, and Privy Council, most recently in 2018.[5]

Even today, though, the test remains opaque. We all know what it is to make a finding that is wrong *simpliciter*, wrong ungarnished by adverb. It is to find that a fact obtains when it does not or to find that a fact does not obtain when it does. But what makes a finding 'plainly' wrong? The word adds something; but what, exactly? Lord Shaw does not say. Later courts have had little to add.[6] Yet the answer matters. 'Most cases turn on findings of fact.'[7] And the most general limit on this most common basis for a decision is the neglected plainly wrong standard.

Here I try to give the plainly wrong standard the attention it deserves. I provide an analysis of what it is for a trial judge's finding of fact to be plainly wrong. My analysis will make more sense with the background in place, but roughly it goes like this. Rationally, a court should not believe both that a judge is a better fact finder and that the judge was wrong to find some fact. If a court does happen to believe both, then it needs to give up one of these beliefs; but which? Answer: the court should give up the belief it is less certain or confident of, other things being equal. So, a court should accept a judge's finding unless it is more certain that the finding is wrong than that the judge

2 *Clarke* v *Edinburgh & District Tramways Co* 1919 SC (HL) 35.
3 *ibid*, 37.
4 *Staechelin & Ors* v *ACLBDD Holdings Ltd & Ors* [2019] EWCA Civ 817 at [30] per Lewison LJ.
5 See for example *McGraddie* v *McGraddie* [2013] UKSC 58 at [2]; *Henderson* v *Foxworth Investments* [2014] UKSC 41 at [61]; *DB* v *Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7 at [78]; *Bahamasair Holdings Ltd* v *Messier Dowty Inc* [2018] UKPC 25 at [33], [37].
6 The one exception is *Henderson* v *Foxworth Investments ibid*, which I discuss in below.
7 J. Leabeater and L. McCafferty, *Civil Appeals: Principles and Procedure* (London: Sweet & Maxwell, 2nd ed, 2015) 92.

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is a better fact finder. In a slogan: a plainly wrong finding is a definitely wrong finding.

This is how I proceed. In the next section I introduce two detailed examples of the plainly wrong standard in operation. I then explain that our question – when should a court reject the view of a judge on a factual matter? – can be recast as an instance of a more general question – when should you reject the view of a person you believe is more likely to be right? On that more general question, guidance is available in epistemology. I set out the two leading answers in epistemology and argue for one of them. Based on that answer, I argue for my account of plain wrongness. With that account in hand, I explain why courts interfere with only plainly wrong findings even though the Civil Procedure Rules instruct them to reverse any 'wrong' decision. Finally, I explore the implications for our understanding of deference in public law contexts.

I caution that this article is solely about the plainly wrong standard. I am not concerned here with other grounds for interference with a judge's factual findings. That means I will not discuss failures to take into account evidence, for example.[8] Nor will I discuss appeals in respect of evaluative judgments or exercises of discretion by trial judges. In what follows by 'judge' I mean a tribunal of fact consisting of a judge or judges and by 'court' I mean an appellate body.

EXAMPLES

It is hard to discuss a challenge to a specific factual finding without setting out quite a lot of a case's factual context. For that reason, I will focus on two cases. I choose these cases not because they are unusual or influential or even well-known; rather, they are good representatives of their type because they are ordinary. What they show, above all, is the complexity of the factual issues that can arise on appeal and the need for judgment and interpretation to resolve them.

The "Ikarian Reefer"

In April 1985, Ikarian Reefer ran aground on the Shoals of St Ann, off the coast of Sierra Leone. All of her crew members abandoned the ship, and she eventually sank. Ikarian Reefer had been insured by its owners for US $3,000,000, but when the owners made a claim on the insurance policy, the insurers rejected that claim on the basis that the ship had been deliberately grounded. Thus, the main issue in *The "Ikarian Reefer"*[9] was: Was the ship accidentally grounded or deliberately scuttled?

8 For a useful discussion for this ground, see D. Di Mambro and H.J. Leslie, *Manual of Civil Appeals* (London: Butterworths, 2000) 34-36.
9 *The "Ikarian Reefer"* [1995] 1 Lloyds Rep 455 (CA).

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In the early hours of 12 April 1985, Ikarian Reefer was off the coast of Guinea-Bissau. Its ultimate destination was south and east, in the Ivory Coast. In between lay the Shoals. At 04:00, the ship's master, an experienced captain with a 'sound and perhaps distinguished'[10] record, oversaw a change in course to 137 degrees. This course, if maintained, would take Ikarian Reefer to a safe position 20 miles from the Shoals, setting aside the effects of currents, tides, etc. There were no further course adjustments until that evening. At 19:35, the chief officer, whose watch it then was, obtained a satnav fix on the coordinates of Ikarian Reefer. He plotted the ship's position as 'five-six miles'[11] north-east of its intended course. This much was common ground on appeal. What happened after was disputed.

At 20:00, the master began his watch. The chief officer said that, at the passing of the watch, he told the master that the ship was off course. The master said he did not recall this conversation. At around 20:20, the master altered course to 115 degrees, taking the ship more sharply east, ostensibly to save time. Given Ikarian Reefer's actual position, this course would take it close to the Shoals, even setting aside currents and tides; taking those factors into account, the course was extremely dangerous.

Around 23:00, the ship suffered a large impact. The master, whose watch it remained, afterwards said that he believed that Ikarian Reefer was still in deep water and that the ship hit a log. The master did not check the satnav position, use the ship's echo-sounder to check the depth of the waters, stop, or slow down. A second impact was then felt; again, the master allegedly believed it was a log. Soon after this second impact, the ship ran permanently aground.

The trial judge, Cresswell J, was presented with both documentary and oral evidence, including testimony from expert witnesses and the master, whom he considered 'honest and truthful'.[12] Based on this evidence, Cresswell J found (among other things):

(1) that the master did not know of the 19:35 satnav fix and at 20:20 thought he was further south and west of the ship's actual position;
(2) that the master's decision to alter course at 20:20, though in error, was due to his belief that it would save time; and
(3) that the master reasonably believed that the vessel had struck logs.[13]

In light of these findings, the judge concluded that the master had been grossly negligent but was not a scuttler. The grounding had been accidental.

The insurers appealed to the Court of Appeal. Stuart-Smith LJ, with whom the other judges agreed, rejected each of the three findings. The chief officer's evidence that he had told the master of the 19:35 satnav position was uncontradicted. It was also intrinsically improbable that the chief officer would not have said that the ship was off course, or that the master would not have asked about the ship's position had the chief officer not mentioned it. Thus, 'the

10 *ibid*, 458.
11 *ibid*, 462.
12 *ibid*, 473.
13 *ibid*, 473.

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only possible finding on the evidence is that the master was aware of the 19:35 satfix'.[14]

It followed that the master knew at 20:20 that the ship was closer to the shore than intended. His claim that he then altered course, taking the ship closer to the Shoals, simply to save time was not credible. 'Unless he had temporarily taken leave of his senses, as to which there is no suggestion, it is inconceivable that such an experienced master could make so egregious an error'.[15] For similar reasons, by 23:00 the master 'must have known perfectly well that he was sailing dangerously close to the Shoals'.[16] He 'must have known that the most likely explanation' for the impacts 'was that the ship had hit bottom and not a log'.[17]

With these crucial findings rejected, Stuart-Smith LJ was 'driven to the conclusion'[18] and 'convinced'[19] that Ikarian Reefer was scuttled. And this was so notwithstanding that the judge 'was clearly influenced by the demeanour and his assessment of the witnesses'.[20] In short, even though the judge had superior access to the crucial evidence, his main findings and overall conclusion were all 'plainly wrong'.[21]

Dixon v Hodgson

In 2003, Mr and Mrs Hodgson bought a large property known as The Arches. A few days later, Mr and Mrs Dixon bought a property directly to the south of The Arches called the Bungalow Site. Near, or at, the border of the two properties runs a brick wall. At the eastern end of this wall are two gate posts, belonging to the Dixons. The Dixons wished to attach gates to the posts, which due to the slope of the land would have to swing outwards, past the wall and towards the Hodgsons' house. In *Dixon* v *Hodgson*[22] (*Dixon*), each side laid claim to the land over which the gates would open.

Among the evidence was a transfer plan, which the Court of Appeal attached to its judgment and which I have included as Figure 1 below. The top of the plan is south and the bottom north. The Arches is in the bottom half of the plan and a bungalow is indicated in the top half. On the south-eastern corner of the Bungalow Site (halfway up the plan on the left-hand side) you can see a short line that angles inward to the north and west; this is the line on which the gate would run. In between the houses are two double dashed lines; these are disused tram lines. The thick dark line is the intended position of the brick wall. As you can see, the wall was supposed to run along, or very close to, the northernmost tram line. In fact – and this is not shown on the plan – the wall

14 *ibid*, 474.
15 *ibid*, 506.
16 *ibid*, 477.
17 *ibid*, 506
18 *ibid*, 506.
19 *ibid*, 506.
20 *ibid*, 506.
21 *ibid*, 458.
22 *Dixon* v *Hodgson* [2011] EWCA Civ 1612.

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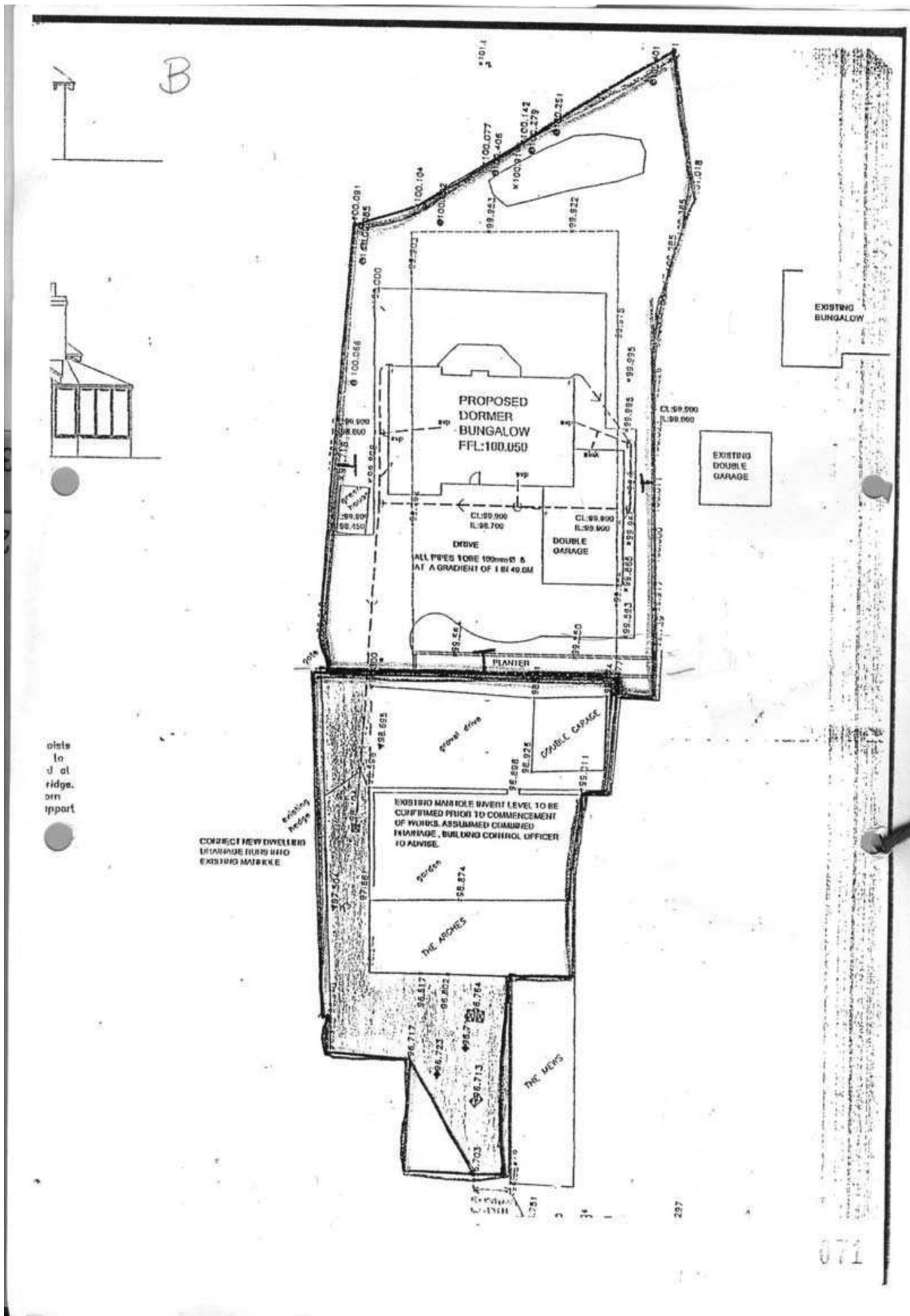

Figure 1: Transfer Plan.

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was built further south, towards the Bungalow Site, along the southernmost tram line.

The Hodgsons claimed that the boundary between the two properties lay along the existing brick wall. Since the gates would swing outwards past the wall, this would mean that the gates would swing onto their property. The Dixons, on the other hand, claimed that the boundary lay along the intended line of the brick wall. This would place the boundary further towards the Arches along the northernmost of the tram lines. The gates would thus swing outwards onto the land between the boundary line and the wall, staying safely within the Dixons' land.

The factual issue before the Recorder, at first instance, was the location of the intended boundary between the two properties. The judge considered the transfer plan and physical features of the site. He accepted that: 'the weight of the evidence clearly suggests that the common boundary was intended to be along the line of a wall, and that this would lead to an entrance onto the Bungalow Site marked by two pillars.'[23]

However, there is a 'clear discrepancy' between the plan and the construction of the wall. 'The wall was actually constructed further south', along the southernmost of the two disused tram lines.[24] No one seemed to have been aware of this discrepancy at the time of the transaction. So, the judge reasoned, the parties must not have 'attached much significance to the plans'.[25] They must have been: 'guided by the physical feature which was then on the ground and demarcated an obvious boundary between the two properties, being the wall on the southern side of the embankment [on top of which the tram lines ran].'[26] Therefore 'the true boundary between the Bungalow site owned by the Dixons and The Arches owned by the Hodgsons is along the northern face of the wall',[27] The Hodgsons had prevailed.

Before the Court of Appeal, the Dixons argued that the judge had erred in his factual finding. Black LJ, writing for the Court, acknowledged that the plan was not definitive. She also allowed that '[a]nyone looking at the site without the benefit of the plan would inevitably suppose that it [the wall] was the boundary'.[28] Still, the plan was an important part of the surrounding circumstances. She wrote:

> Once one began to match the plan to the site, it would be clear … that with the … gate closed, the north/south boundary is straight, not indented. Looking at that with plan in hand, the *obvious* conclusion would be that the indentation of the plan represents the open gate with the hinge at the southern end. The reasonable layman would therefore have found the starting point of the boundary in the east because the plan can now be interpreted to show that it begins at the north end of the gate.[29]

23 *ibid* at [19].
24 *ibid* at [19].
25 *ibid* at [19].
26 *ibid* at [19].
27 *ibid* at [19].
28 *ibid* at [54]
29 *ibid* at [60] (emphasis added).

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The reasonable layman would '*surely* conclude that the boundary squared off the south end of The Arches' site at the level of the north end of the … gate'.[30] Against this background, the parties would have understood the boundary to lie along the northernmost tram line. The judge could only have thought otherwise by 'abandoning the plan completely' in favour of what he saw on the ground, 'thereby failing to give the plan, which was the dominant description'[31] due weight. Black LJ concluded that the Dixons' appeal must succeed: the boundary ran along the northernmost tram line, not the wall.

Black LJ admitted that the factual issue in *Dixon* was 'not easy to determine'.[32] Even though the judge was presented with a range of documentary evidence, spent a great deal of time with the case, and visited the site, it was still plain that he had erred.

I take these two cases, *The "Ikarian Reefer"* and *Dixon*, as representative examples of the plainly wrong standard in operation.[33] What these examples do not tell us, however, is what makes a judge's finding plainly wrong. Supposing that the judge was plainly wrong that the master did not know that the ship was off course, what made it so? What made it true that the judge was plainly wrong as to the intended property line, assuming he was? This sort of question is my concern, going ahead.

METHOD

I start with a methodological issue: how should we work out what makes a finding plainly wrong? I said in the Introduction that, on the one hand, a court has good reason to believe that a trial judge is a more accurate fact finder. On the other hand, there are surely some findings that a court should reject. The question is which findings, exactly, should a court reject. Lord Shaw's answer was that a court should reject findings which, in its view, are plainly wrong. Going ahead, I propose to treat 'plainly wrong' as a placeholder for the conditions under which a court should reject a judge's finding, despite believing, at least initially, that the judge is a better fact finder. My method is to first work out what these conditions are and then to treat those conditions as definitional of a plainly wrong finding.

Of course, this raises another methodological issue: how should we work out when a court should reject a judge's finding? Let us say that you are my *epistemic superior* on some matter if and only if your judgment on that matter is more likely accurate or true than my independent judgment.[34] And let us say that you are an *epistemic authority* for me on a matter if and only if I believe that

30 *ibid* at [63] (emphasis added).
31 *ibid* at [64].
32 *ibid* at [66].
33 For this interpretation of the significance of *Dixon v Hodgson*, see *Boas* v *Adventure International Ltd* [2020] EWHC 237 (Ch) at [38]-[39].
34 A. Elga, 'Reflection and Disagreement' (2007) 41 *Nous* 478, 484.

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you are my epistemic superior on that matter.[35] There is reason to believe that Cresswell J was the Court of Appeal's epistemic superior on whether *Ikarian Reefer* was scuttled, for example. He had seen and heard the witnesses, which the Court had not. He was experienced at making factual determinations. And he had sat with the case for much longer than the Court had. In general, it is plausible that a trial judge is an appellate court's epistemic superior on factual issues. (I return to this point in the next section.)

The judicial fact-finding context is not unique, however. We encounter epistemic superiors and authorities in many contexts. The Met Office is an authority for me on the chance of rain. My wife, an early modern historian, is an epistemic authority for me on the place names of 17th century Christian missions. My father-in-law, a retired electrician, is an epistemic authority for me on the appropriate socket type for the utility room. And my nephew, who is doing A-level maths at the moment, is an epistemic authority for me on the solutions to maths equations.

So, one way to approach our question – when should a court reject a judge's finding of fact? – is to treat it as an instance of a more general question – when should a subject reject an epistemic authority's view? If we could answer this general question, we could derive an answer to our more specific question. Now, the general question has not been discussed by legal doctrinal scholars. It has, however, been discussed in philosophy by epistemologists and I think we can benefit from their research. That at least is my working hypothesis. In the next section, I compare the two main epistemological approaches to the general question.

EPISTEMIC AUTHORITY

How likely is it to rain today? The sky is clear. It is January in England. My neighbour took his umbrella this morning. It rained every day in the past week. All of these facts are evidence of how likely it is to rain today. They are reasons to believe that it is more or less likely to rain, as a result. Assuming that there is nothing else relevant, what I should believe overall depends on the balance of these reasons.

The Met Office, I now learn, says that there is an 80 per cent chance of rain today. The Met Office is, as I said, an epistemic authority for me on the chance of rain. Its claim is evidence that there is an 80 per cent chance of rain. It is a reason for me to believe that there is an 80 per cent chance of rain, as a result. In general, that an epistemic authority believes p (where p is a proposition on which it is an authority) is reason to believe p. This much is common ground. But there are two ways to develop this basic idea.

35 S.E. Bokros, 'A Deference Model of Epistemic Authority' (2021) 198 *Synthese* 12041, 12047.

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Weight and balance

On one way of thinking, that an authority believes *p* is simply a reason to believe *p*; that is the only kind of reason it is.[36] There may be other reasons that count in favour of, or against, believing what the authority does. If so, I should weigh the authority's view alongside all of my other reasons. What I should believe overall depends on the balance of all of my reasons. Essentially, an authority's view is just one more piece of evidence – no less, but also no more

In my example, the Met Office is much superior to me at forecasting the weather. I should attach a great deal of weight to its view, as a result. Nonetheless, its view is not the only reason I have. There is also the fact that the sky is clear, that it is January, that it is England, etc. So, what I should believe as to the chance of rain will depend on the balance of all of my reasons – including, but not limited to, the Met Office's, view. If the competing reasons are weightier, then I should not believe that there is an 80 per cent chance of rain. In other words, I should reject the Met Office's view. With this picture in mind, we will endorse the following principle:

> *Balance principle*: You should believe *p* if an epistemic authority believes *p*, unless there are sufficiently weighty contrary reasons.

'Sufficiently weighty' means weightier than the combined weight of the authority's belief and any other reasons for that belief. Thus, I should believe that there is an 80 per cent chance of rain unless the reasons for believing otherwise count for more than the Met Office's opinion plus any evidence that supports its opinion.

Pre-emption and reflection

There is another way to develop the idea that an epistemic authority's view is a reason for you to hold that view. This alternative takes its inspiration from Joseph Raz's well-known work on practical authority (authority as to what to do rather than what to believe). According to Raz, an authority's directive is a reason to do as directed; but that is not all. The directive is, in addition, a reason that pre-empts other reasons.[37] Once pre-empted, a reason ceases to be a permissible basis for action. What the subject should do becomes a function of the balance only of non-pre-empted reasons. As a result, it is possible that a subject should do what an authority directs even though it is contrary to his or her weightiest reasons.

36 J. Lackey, 'Experts and Peer Disagreement' in M.A. Benton, J. Hawthorne, D. Rabinowitz (eds), *Knowledge, Belief, and God* (OUP 2018) 238-9. See also T. Dougherty, 'Zagzebski, Authority, and Faith' (2014) 6 European Journal for Philosophy of Religion 47.

37 J. Raz, *Authority of Law* (Oxford: OUP, 1979) 17-19; J. Raz, *The Morality of Freedom* (Oxford: OUP, 1988) ch 3; J. Raz, *Ethics and the Public Domain* (Oxford: OUP, 1994) 213-215.

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Many epistemologists think that epistemic authority is analogous to practical authority, as Raz understood it.[38] An epistemic authority's view is a reason in favour of that belief. In addition, it is a reason that pre-empts other reasons for or against that belief. The only reason that remains – and thus the only permissible basis of belief – is the authority's view. As Linda Zagzebski, the main proponent of this account, puts it: the 'fact that the authority has a belief *p* is a reason for me to believe *p* that replaces my other reasons relevant to believing *p* and is not simply added to them'.[39]

Raz was aware of the possible extension to epistemic contexts.[40] In his recent work he was explicit that the views of experts are pre-emptive reasons. In his example: 'I see the piece of meat at the butchers, and its colour makes me think that it is not fresh. But I do not have experience or theory to back me up. My expert friend reassures me that the meat is fresh, and I just yield. If I accept my friend's expertise, relative to me, I have no choice.'[41]

There is no choice as to what to believe in that the '[t]heoretical advice pre-empts the reasons for belief that I would have relied upon otherwise'.[42] All that remains is the friend's advice. These claims imply the following principle:

Reflection principle: You should believe *p* if an epistemic authority believes *p*.

Crucially, the weight of the evidence against *p* is irrelevant. To treat the Met Office as an authority on weather forecasting means *not* basing my belief on all of my evidence. It means believing as the Met Office does, even if I think the weight of evidence is to the contrary.

It may seem that the reflection principle requires unconditional adoption of an authority's views. That would make it a poor principle on which to found an analysis of why courts should set aside judicial findings of fact. There is a response, but I will have to ask you to wait until the next section. First I need to explain why the reflection principle is superior to the balance principle.

The track record argument

The balance principle and the reflection principle are inconsistent. To work out how we should respond to an epistemic authority's views, we need to choose between them. I assume we should choose the one that would lead subjects to have more accurate beliefs, were they to adhere to it.[43]

38 See for example L. Zagzebski, *Epistemic Authority* (Oxford: OUP, 2012) ch 5; A. Keren, 'Zagzebski on Authority and Pre-emption in the Domain of Belief' (2014) 6 *European Journal for Philosophy of Religion* 61; J. Constantin and T. Grundmann, 'Epistemic Authority: Preemption Through Source-Sensitive Defeat' (2020) 197 *Synthese* 197; Bokros, n 35 above, 12047.
39 L Zagzebski, 'A Defense of Epistemic Authority' (2013) 90 *Res Philosophica* 293, 298.
40 Raz, *The Morality of Freedom* n 36 above, 52-53.
41 J. Raz, 'Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1002, 1033.
42 *ibid*, 1033.
43 The argument that follows is based on Raz, *The Morality of Freedom* n 36 above, 68-69. For discussion and defences of this argument, see Zagzebski, n 38 above, 301-302; Bokros, n 35 above, 12052-12055.

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Suppose that you are an epistemic authority for me on various matters. On these matters, we start by forming our own beliefs, independent of one another. Perhaps there are cases in which we have the same belief; we agree, in other words. I should treat your belief as a reason to hold the belief you do. Obviously, this will not lead me to change my view, since your view simply confirms my own. And this is true whether I adhere to the balance or reflection principle. Let us therefore set these cases aside; they do not help us decide between the two principles.

What interests us are cases in which we start off disagreeing. In these cases, your view is a reason to change my mind so that I end up with the same view as you. Now, in some of these cases, the weight attached to your view will be enough to tip the balance of reasons in favour of your view. If I adhere to the balance principle, I will end up changing my mind. The reflection principle leads to the same result; it, too, tells me to agree with you. Again, the principles converge. So again, we can set these cases aside.

In other cases in which we start off disagreeing, however, the weight given to your view will be *insufficient* to tip the balance of reasons in favour of your view. If I adhere to the balance principle, I will not change my mind. If I adhere to the reflection principle, I will. In general, the two principles diverge when (1) the authority's view is contrary to the balance of (other) reasons, and (2) the authority's view does not tip the balance of reasons in favour of his or her view. Call cases that meet both conditions *divergence cases*.

If I adhere to the balance principle in divergence cases, my track record in those cases will be the same as if I relied simply on my own judgment. After all, I do not change my view in light of your contrary view. By hypothesis, my track record in these cases is probably worse than yours. That is what it means for you to be an authority: your views are likely more accurate than mine. By contrast, if I adhere to the reflection principle, then our track records will be the same in divergence cases. That is because in all such cases I end up mirroring your views. So, compared with relying only on my own judgment or adhering to the balance principle, adhering to the reflection principle likely improves my track record.

Putting this together, in many cases the balance and reflection principles converge and neither has an advantage. But there are divergence cases and in those cases the reflection principle is better. Since it is worse in no respect and better in one respect, the reflection principle is dominant. We should endorse that principle.

SUBMISSION OR REJECTION

Despite its advantages, the reflection principle may seem to lead to some unsettling consequences. We should not follow the orders of a practical authority, regardless of what is ordered. Nor should we believe as an epistemic authority believes, no matter how despicable or outrageous that belief is. And yet that is what the reflection principle seems to demand. For the same reason, the reflection principle may seem like inhospitable territory on which to build an

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analysis of the plainly wrong standard. If that principle demands blind trust in authorities, and there is reason for courts to treat judges as authorities on factual issues, then courts should accept a judge's findings, come what may. No finding should be set aside, however plainly wrong.

So it is crucial to know: does it really follow from the reflection principle that a court should accept a judge's findings, come what may? More generally, does it follow from that principle that a subject should blindly adopt an epistemic authority's views? No. To see why, consider a principle with a similar structure:

> You should *x* if you promised to *x*.

This principle is ambiguous. One possible reading is that, if you promise to *x*, then you are required to *x*. When the antecedent is satisfied, you come under a requirement, namely, to make the consequent (you *x*) true. Another possible reading is that you are required to make it so that, if you promise to *x*, then you *x*. What you are required to do is make the conditional true. The difference lies in the scope of 'should'. It includes only the consequent on the first interpretation, but the whole conditional on the second interpretation.[44] Why does this difference matter? There is only one way to satisfy the principle on its first reading: by keeping a promise. By contrast, you can make the whole conditional true in either of two ways: by falsifying the antecedent (not promising) or by making true the consequent (keeping the promise). So, when you do not make a promise, you satisfy the principle on its second, but not its first, reading.

The reflection principle is similarly ambiguous.[45] On one reading, the 'should' has a narrow scope. We can make that clear by rewriting the principle like this:

> *Reflection principle (narrow)*: If an epistemic authority believes *p*, then you should believe *p*.

There is only one way to satisfy the narrow-scope principle: by believing as the authority does. So, the narrow-scope version really does demand blind faith in an authority. That makes it unacceptable.

On another reading, the 'should' has a wide scope: the subject should make the entire conditional true. Here is a formulation that makes this clear (adding 'see to it that' for readability):

> *Reflection principle (wide)*: You should see to it that {if an epistemic authority believes *p*, then you believe *p*}.

44 This example is adapted from J. Broome, *Rationality Through Reasoning* (Oxford: Wiley-Blackwell, 2013) 124. The seminal paper on the scope of reasons, oughts, and normative requirements is J. Broome, 'Normative Requirements' (1999) 12 *Ratio* 398.

45 A point I learned from Bokros, n 35 above, 12060. This paragraph and the next two are based on Bokros's discussion.

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There are two ways you can make the conditional true. You can make the consequent true by believing *p*. Or you can make the antecedent false. Since an epistemic authority is someone whom you believe is your epistemic superior, you make the antecedent false by no longer believing that person is your epistemic superior. (I assume you cannot make them change their mind and stop believing *p*.) From the perspective of the wide-scope principle, it does not matter which.

So, the wide-scope principle does not tell you to believe as an authority does. It tells you to *either* believe as an authority does *or* to stop believing that they are an authority. In other words, it tells you to make sure that two things are not both true, namely, that you believe someone knows better than you and that you disagree with them. Submit to the authority's view or reject the authority – either way, you do all that the wide-scope principle demands. Understood in this way, the reflection principle does *not* demand blind adoption of the epistemic authority's views.

To see why the difference in scope matters, suppose you believe that your GP is an epistemic superior on health-related matters. One day your GP tells you to take 4000 pills an hour for the rest of your life.[46] The narrow-scope principle tells you to believe that you should take 4000 pills an hour for the rest of your life – absurd! By contrast, the wide-scope principle gives you two options: believe what your GP tells you – or stop believing that the GP is your superior on health-related matter (or at least, on *this* health-related matter). Between these options, the choice is clear: you should stop believing that your GP is your superior. Zagzebski explains: '… you will judge that your belief that you should not take so many pills is more likely to be true than your judgment that your physician is an authoritative guide to your health. … Epistemic authority has the consequence that trust in ourselves in some domain is replaced by trust in the authority, but it remains the case that … the judgment that someone is an authority can be withdrawn.'[47]

You might be 99 per cent confident that your GP is your superior on health-related matters. But you will be even more confident – say, 99.9999 per cent – that you should not take 4000 pills an hour for the rest of your life (and thus that the GP is wrong).[48] Forced to choose between these beliefs, you should retain the belief that you should not take so many pills and abandon the belief that the GP is your superior.

Here is another example along similar lines. If my nephew, the one who is doing A-level maths, says that the product of

-0.00518
17,577,797

46 The example is from Zagzebski, n 38 above, 302. She adapted it from an example by T. May, *Autonomy, Authority and Moral Responsibility* (Dordrecht: Kluwer, 1998) 145.

47 Zagzebski, *ibid*, 302-303; see also Zagzebski, n 38 above 116 and Elga, n 34 above, 483. In 'Disagreement about Disagreement? What Disagreement about Disagreement' (2014) 14 *Philosopher's Imprint* 1, 6-7, Alex Worsnip similarly claims that if someone you hitherto believed was as likely to be accurate as you turns out to hold an outrageous view, the appropriate response is to downgrade your estimation of their accuracy.

48 Bokros, n 35 above, 12063.

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26,954.56
-1,699
is
-4,169,844,215,820,818

then I am justified in rejecting his view. I do not know what the right answer is. But I do know that the product of two negative numbers and two positive numbers cannot be negative.[49] I might have started out quite confident that my nephew is my superior on maths questions. I am *absolutely certain*, however, that the product of these numbers cannot be negative. I should give up the former belief before I give up the latter.

The general rule on which Zagzebski implicitly relies is that, when forced to choose between two beliefs, where both were formed rationally, you should retain the one you are more confident of and abandon the one you are less confident of, other things being equal.[50] Based on this rule, and the wide reading of the reflection principle, we can fashion a new analysis of plainly wrong factual findings.

PLAINNESS AND DEFINITENESS

I said that in *The "Ikarian Reefer"* one issue was whether the master knew that at 19:35 the ship was off course. Stuart-Smith LJ believes, initially, that Cresswell J is a more reliable factfinder than he is. But Stuart-Smith LJ also believes that Cresswell J is wrong that the master did not know that the ship was off course. By possessing both beliefs, Stuart-Smith LJ is in violation of the reflection principle (in its wide-scope version). Not all is as it should be, epistemically speaking. To put things right, Stuart-Smith LJ needs to give up one of these two beliefs.

Suppose that Stuart-Smith LJ is 90 per cent confident that Cresswell J, who saw and heard the witnesses, is an authority on the facts of *The "Ikarian Reefer"*. That is quite confident. But he is even more sure that the master knew that the ship was off course. He is 'convinced'[51] of this fact. He is, let us suppose, 99 per cent confident that Cresswell J erred and that really the master did know that the ship was off course. Between these two beliefs, Stuart-Smith LJ should give up the belief he is less confident of and retain the one he is more confident of. That means revising his initial view and concluding that, in fact, the trial judge is not an epistemic authority on this issue.

I said in in the last section that 'plainly wrong' is a placeholder for the conditions under which a court should reject a judge's finding of fact. I have now said that a court should reject a judge's finding if and only if the court is more certain that the judge is wrong than that the judge is the court's epistemic superior. A judge's finding is, let us stipulate, 'definitely' wrong just when this condition is met. Thus:

49 Loosely modelled on Raz, *The Morality of Freedom* n 36 above, 62.
50 This more precise formulation is from Bokros, n 35 above, 12063.
51 *The "Ikarian Reefer"* n 9 above, 506.

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Plainness as definiteness: A judge's finding of fact is plainly wrong (from a court's point of view) if and only if it is definitely wrong (from that point of view).

This is my central claim; it is the heart of my analysis. How my test applies depends very much on context, however. To explain why, I need to say more about the sources of a judge's epistemic superiority.

Sometimes a judge has an *evidential advantage* over a court in respect of an issue: the judge has more evidence than the court on which to base his or her finding on that issue.[52] The key evidence in *The "Ikarian Reefer"* as to what the master knew was oral. The trial judge therefore had an evidential advantage over the court, which had only transcripts. Similarly, in *Dixon* v *Hodgson*, the trial judge visited the site; the Court of Appeal judges did not. In other circumstances, neither the judge nor the court enjoys an evidential advantage. Most obvious is when all of the evidence on an issue are documents, which can be fully reproduced on appeal.

Perhaps a less obvious circumstance in which the trial judge enjoys no evidential advantage over a court is when a factual finding is merely an inference from other findings. The best example is *Datec Electronics Holdings Ltd* v *UPS*[53] (*Datec*). Datec hired UPS to pick up three packages of computer processors, worth £250,000, and deliver them to one of its customers in Amsterdam. The packages arrived safely in the UPS warehouse in Amsterdam, but never reached the customer. At some point they had disappeared. There were three realistic explanations:

(1) the parcels had been accidentally delivered to someone else,
(2) the parcels had been lost inside the warehouse, or
(3) the parcels had been stolen by a UPS employee.

Based on the oral and written evidence, the trial judge found *inter alia* that no signatures had been obtained from any recipients, that undeliverable items were inventoried and then auctioned off, and that the UPS driver assigned to deliver the packages had flown to Morocco a few days after they disappeared. Nonetheless, the judge concluded that 3 was not more probable than either 1 or 2.[54]

The House of Lords held that the trial judge had erred. With respect to the possibility that the packages had been lost in the warehouse, the expert witnesses on both sides thought this possibility 'less likely than the others'.[55] The possibility that the packages were delivered to the wrong recipient runs up, Lord Mance said, 'against the inherent implausibility of three … separate packages due for delivery … being innocently misdelivered on the same day without any … signature being obtained from anyone'.[56] By contrast, there was

52 My definitions of evidential advantage and evidential superiority are, with minor changes, from Bokros, n 35 above, 12049.
53 *Datec Electronics Holdings Ltd* v *UPS* [2007] 1 UKHL 23.
54 *Datec Electronics Holdings Ltd* v *UPS* [2005] 1 Lloyd's Rep 470 at [66].
55 *Datec Electronics Holdings Ltd* v *UPS* n 53 above at [50].
56 *ibid* at [50].

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nothing inherently implausible about employee theft. His Lordship concluded 'without hesitation … that theft involving a UPS employee was shown on a strong balance of probability to have been the cause of this loss'.[57]

The point to notice in *Datec* is that the overturned finding was not based directly on oral or written evidence. It was an inference from other findings. Those other findings – for example that no one signed for the packages – were equally available to the court as a basis for inference. On the key issue, then, the judge and the court were on the same evidential footing.

Sometimes a judge has an *evaluative advantage* over a court in respect of an issue: the judge is better at evaluating evidence on that issue.[58] There is typically reason to think that a judge is better at evaluating evidence. I say this for two reasons. First, a trial judge is generally much more familiar with a case than an appellate court. As the Supreme Court of Canada said: 'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the [appellate court] … whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'[59]

Second, a judge is more recently experienced at finding facts than a court and experience begets expertise.[60] For example, it seems plausible that Cresswell J – an experienced trial judge who presided over the hearing in in *The "Ikarian Reefer"* over many days – is better than an appellate court at assessing the evidence as to what the master knew.

The greater a judge's apparent evidential or evaluative advantage, the more confident the court should be that the judge is its epistemic superior. In *The "Ikarian Reefer"*, the judge has a marked evidential advantage over the court. In *Dixon*, that advantage is less: the judge had the 'great advantage of being able to visit the site', yet the transfer plan – a document – was also of prime importance. And in *Datec* there is no evidential advantage at all. In each case, though, there is reason to believe that the judge has an evaluative advantage over the court. Putting these points together, if the court in *The "Ikarian Reefer"* is 90 per cent confident that the trial judge is its epistemic superior, then we might expect the court in *Dixon* to be 80 per cent confident and the court in *Datec* to be 70 per cent confident of the same.

A difference in confidence can lead to a difference in result. To set aside the finding in *Datec*, the court must be more than 70 per cent confident that the packages were probably stolen. To set aside the finding in *Dixon* the court must be more than 80 per cent confident that the property boundary ran along the intended line of the low wall. And to set aside the finding in *The "Ikarian Reefer"* the court must be more confident still – more than 90 per cent – that

57 *ibid* at [50].
58 Bokros, n 35 above, 12049.
59 *Housen* v *Nikolaisen* [2002] 2 SCR 235 at [53], endorsed in *McGraddie* v *McGraddie* n 5 above at [4].
60 *Anderson* v *City of Bessemer* 470 US 564 (1985), 574-575, endorsed in *McGraddie* v *McGraddie ibid* at [3].

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the master knew the ship was off course. In short, the more evidence that a judge is a court's superior, the more evidence it takes to convince the court that the judge is wrong.

This conclusion accords with how courts think of deference to trial judges. Courts are not equally willing to set aside factual findings, no matter what the context. Their willingness depends on the nature of the evidence and factfinder. In *EI Dupont de Nemours & Co* v *ST Dupont*,[61] May LJ said: 'There will be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue … Further along the spectrum will be multi-factorial decisions often dependent on inferences and analysis of documentary material.'[62]

The degree of 'appropriate respect' will also depend on 'the nature of the lower court and its decision making process'.[63] Using May LJ's metaphor, *Datec* lies towards one end of the 'spectrum', *Dixon* in the middle, and *The "Ikarian Reefer"* towards the opposite, more 'respectful' end.

In sum, the plainly wrong standard is a comparative test. It does not ask simply if the court is 70 per cent, 80 per cent, 90 per cent etc confident that the judge was wrong. It asks whether the court is more confident that the judge is wrong than that the judge is its epistemic superior. How difficult that standard is to meet depends on how confident the court is that the judge is its superior. A court should be more willing to set aside the finding in *Dixon* than in *The "Ikarian Reefer"*, for example. And that is so even though in both cases the court must be satisfied that the finding is plainly wrong before it sets it aside. So, while the plainly wrong standard is a unified standard that poses a single question (is the judge's finding definitely wrong?), its structure is complex. I suspect that this complexity is one reason why the standard has so far resisted analysis.

WRONG *SIMPLICITER*

Now is a good time to address a worry you might have had from the start. It is a worry about the 'plainly wrong' standard itself, which my analysis can help resolve.

Rule 52.21(3) of the Civil Procedure Rules say that the appeal court must allow an appeal if the lower court's decision is 'wrong'. This includes a decision as to a factual matter. The rule does *not* say that the decision can be overturned only if it is 'plainly wrong'. Presumably, a finding can be wrong without being plainly wrong. And yet it is only plainly wrong findings that courts overturn. So, it seems that there must be some findings that the CPR tells the courts to overturn but that courts refuse to overturn, namely, findings that are wrong *simpliciter*. That is the worry.[64]

61 *EI Dupont de Nemours & Co* v *ST Dupont* [2003] EWCA Civ 1368.

62 *ibid* at [94]. On the distinction between primary facts and inferences, see *Battersea BC* v *British Iron and Steel Research Association* [1949] 1 KB 434, 471.

63 *EI Dupont de Nemours & Co* v *ST Dupont* n 61 above at [94].

64 This worry is discussed at length in relation to evaluative conclusions by trial judges in *R (B: A Child) (Care Proceedings: Appeal)* [2013] UKSC 33 at [44] per Lord Wilson, [91]-[93] per Lady

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Let us distinguish two times (or time periods). Initially a court forms its own view of the facts. Then the court takes into account the judge's view and revises its own view if appropriate. Now, it is possible that a court initially believes that a finding is wrong but not plainly wrong. But this possibility is not rationally maintainable. Suppose a court is 60 per cent confident that the judge is wrong and 80 per cent confident that the judge is its superior. So, it believes that the finding is wrong (it has more than 50 per cent confidence in that proposition[65]) yet not plainly wrong (60 per cent is less than 80 per cent). This is not a rational combination of beliefs, as I explained in Submission or Rejection. The court has to give up one of these beliefs. And the belief it should abandon is that the finding is wrong, since it is the one the court is less confident of.

The worry is therefore misplaced. A court may start out believing that a finding is wrong but not plainly wrong. But it will, if rational, revise its views and end up believing neither that the finding is wrong nor plainly wrong. Courts can rely on the plainly wrong standard *and* do their duty under the CPR.

LORD REED'S DICTUM

I said in the Introduction that courts have had little to say about what makes a finding plainly wrong. While that is true, they have not been silent on the question either. There is one case that squarely addresses the question, albeit briefly. In *Henderson* v *Foxworth Investments*, Lord Reed said: 'There is a risk that it [the phrase "plainly wrong"] may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion.'[66]

I have just said that we should understand what makes a finding plainly wrong in terms of degrees of confidence. On the face of it, Lord Reed says that we should not do precisely this. Is my analysis therefore at odds with the Supreme Court's understanding of the plainly wrong standard? Lord Reed's worry, I think, is that a court will assess the facts, arrive at a finding, and if it is very confident that its finding is correct, set aside a judge's inconsistent finding. The court will substitute its own findings, just if it is very confident in those findings. This is *not* what my analysis favours. On my analysis, it does not matter, in itself, whether a court is 70 per cent, 80 per cent, 90 per cent … confident that a judge's finding is wrong. The court's absolute degree of confidence is

Hale. Lady Hale made similar remarks while on the Court of Appeal: *Indrakumar* v *Secretary of State for the Home Department* [2003] EWCA 1677. See also Leabeater and McCafferty, n 7 above, 97.

65 It is a common view that a greater than 50 per cent confidence in a proposition is belief in that proposition – but not an uncontroversial view. For more on the relationship between confidence and belief, see E.G. Jackson, 'The Relationship Between Belief and Credence' (2020) 15 *Philosophy Compass* 1.

66 *Henderson* v *Foxworth Investments* n 5 above at [62].

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irrelevant. If this is what Lord Reed is saying, and I think it is, then we agree. After saying what the plainly wrong standard is *not*, Lord Reed says what he thinks it *is*: 'What matters is whether the decision under appeal is one that no reasonable judge could have reached.'[67]

And a little later he adds: '[A]n appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot be reasonably explained or justified.'[68]

I confess to finding this a little ironic. To explain 'plainly wrong', a phrase apt to confuse, Lord Reed reaches for language nearly identical to that in *Associated Provincial Picture Houses* v *Wednesbury Corp*, where it was held that an authority must not make a decision such that 'no reasonable authority could ever have come to it'.[69] But the nature of *Wednesbury* reasonableness is itself obscure – famously so! Administrative law scholars and courts have tried to spell out what it requires for more than 70 years, with notably little success.[70]

So, I am afraid that Lord Reed's attempt at exposition does not illuminate. To be clear, I accept that saying that 'no reasonable judge could have reached' a finding is another way of saying that it is 'plainly wrong'. I accept, that is, that these phrases are synonymous. But paraphrase is not analysis. And analysis is what the last three sections were meant to provide.

BINARY DEFERENCE

There are many ways to extend the analysis. For example, I suspect that we could analyse judicial review of administrative fact finding in terms similar to appellate review of a lower court's fact finding. Courts are slow to overturn administrative findings of fact – for good reason, given that administrators are often epistemic authorities for courts on factual matters.[71] Courts *are* sometimes willing to interfere with those findings, however, and rightly so. So, when should a court set aside an administrator's factual findings? My analysis suggests a partial answer: a court should set aside an administrator's finding if, from the court's point of view, that finding is definitely wrong.[72] I do not claim that this suggestion is correct; more would have to be said about the administrative context to conclude that. More generally, I am optimistic that my analysis

67 *ibid* at [62].
68 *ibid* at [67].
69 *Associated Provincial Picture Houses* v *Wednesbury Corp* [1947] 1 KB 223, 230.
70 For some recent efforts, see P. Daly, '*Wednesbury's* Reason and Structure' [2011] PL 238, H. Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84 MLR 265.
71 See for example *R* v *London Rent Tribunal, ex p Honig* [1951] 1 KB 641, 646 per Lord Goddard CJ; *Puhlhofer* v *Hillingdon LBC* [1986] 1 AC 484 (HL), 518 per Lord Brightman; P. Daly, 'Facticity: Judicial Review of Factual Error in Comparative Perspective' in P. Cane, C. Herwig, H. Hofmann, E.C. Ip and P.L. Lindseth, *The Oxford Handbook of Comparative Administrative Law* (Oxford: OUP, 2020) 904-905.
72 A merely partial answer because there are other circumstances in which factual findings should be set aside, for example when evidence has been ignored or there is no evidence for a finding. For a summary of the grounds on which factual findings will be overturned, see *Begum* v *Tower Hamlets London Borough Council* [2003] UKHL 5 at [99].

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could be extended to other fact-finding contexts as well as to review of some discretionary decisions (for example by trial judges).

Rather than discuss a specific extension in detail, I want to consider a concept of general relevance: deference. Courts are often described as deferring to the view of another body (for example a trial judge, legislature, school, minister). One reason for deference is supposed to be the other body's greater expertise and access to evidence – its epistemic superiority.[73] Let us suppose that a body is a court's epistemic superior on some matter under adjudication. In what sense should a court defer to the official's view?

Scholars and courts appear to be of one mind as to the answer. The court should defer to the other body's opinion in that it should attach 'weight' to its opinion when the court forms its own conclusion.[74] The deference paid to the other body – the weight attached to its view – could be considerable. Nonetheless, other considerations can be weightier. As a result, a court may end up departing from, say, the legislature's view despite deferring to it. In other words, deference does not 'necessarily'[75] or 'automatically'[76] lead a court to accept another body's view. Scholars call this model of deference (a bit tendentiously) the 'due deference model'.[77]

There is an obvious relationship between due deference and the balance principle. The balance principle will instruct a court to attach weight to a body's view if the court believes that the body is its epistemic superior. Since that weight need not be absolute, the view of, for instance, the legislature could be outweighed. Due deference can therefore be understood as an implication of the balance principle (insofar as due deference is based on epistemic grounds). And yet I have argued against the balance principle and in favour of the reflection principle. As a result, I am committed to opposing due deference insofar as it is epistemically motivated. (I express no view as to the merit of due deference on other grounds, for example democratic legitimacy.)

The reflection principle – in its wide formulation – favours a different approach. What matters is (1) how rationally certain a court is that the legislature or other body is its epistemic superior and (2) how rationally certain it is that the

73 *International Transport Roth GmbH* v *SSHD* [2002] EWCA Civ 158 at [87]; *R (Begum)* v *Headteacher and Governors of Denbigh High School* [2006] UKHL 15 at [34].

74 See for example *Huang* v *Secretary of State for the Home Department* [2007] UKHL 11 at [16] (the court should give 'appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice'); A. Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G. Huscroft (ed), *Expounding the Constitution* (Cambridge: Cambridge University Press, 2008) ('deference is a matter of assigning weight to the judgment of another …'). There are other models of deference, as discussed in D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Demoracy' in M. Taggart (ed), *The Province of Administrative Law* (Oxford: Hart, 1997); M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of Due Deference' in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003).

75 A. Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222, 225.

76 A. Young, 'Deference, Dialogue and the Search for Legitimacy' (2010) 30 OJLS 815, 818.

77 See for example M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of Due Deference' in Bamforth and Leyland (eds), n 73 above; A. Young, 'In Defence of Due Deference' (2009) 72 MLR 554.

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other body is wrong. If the court is more certain that the other body is wrong, then the court has no business deferring. Why would it, when the court rationally believes that the other body is no more likely to be right than it is? But if the court is more certain that the other body is its superior, then it must set aside its misgivings and adopt that other body's view – full stop. This does not mean that a court should blindly defer to any body's views. The point is that a court cannot rationally both defer to and depart from another body's views. It must choose. In respect of its significance for a court's ultimate views, the other body's views should be decisive *or* irrelevant. Deference, on epistemic grounds, is binary.

CONCLUSION

My discussion is important for two reasons. First, the plainly wrong test is itself important, yet also opaque and neglected. I have tried to give the plainly wrong test the attention it deserves and to make clear what a plainly wrong finding is. My analysis has many virtues. Among other things, it has a strong philosophical foundation, it fits well with representative examples of plainly wrong findings, and it accounts for the explicit language in the CPR. Second, my argument is founded on the wide scope version of the reflection principle. I believe that this principle has implications for our understanding of review by judges of many bodies' decisions. While I have not been able to demonstrate this broader claim conclusively, my discussion of the plainly wrong test is proof of potential. Further questions must, however, be postponed to a later occasion.

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