

Proportionality

Jason Rowley

Proportionality - Questions



Is there any hope for clarity on proportionality?

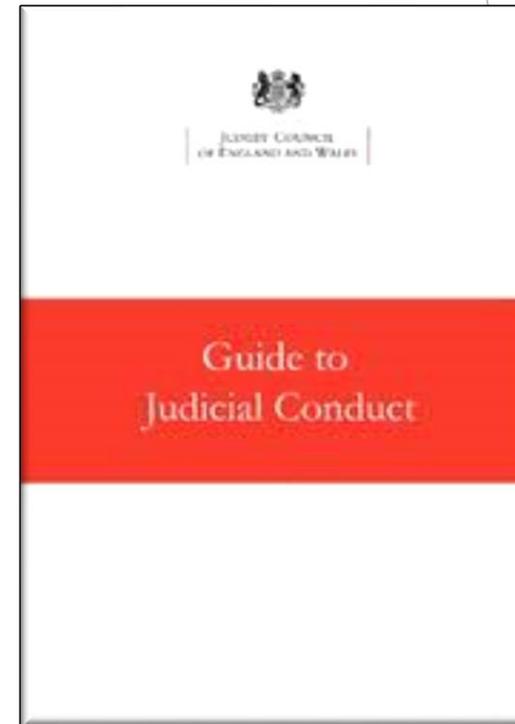
How are you to advise on proportionality?

Is there any new and practical thinking?

Before I start...

All judges should be aware that, by long standing convention, they should not comment publicly on:

- the merits, meaning, or likely effect of government policy or proposals, including proposed legislation;
- the merits of public appointments; or,
- the merits of individual cases.



How much proportionality is there?

Reported cases since January 2018

- a) 1 - 200
- b) 201 - 500
- c) 501 - 1,000
- d) 1,000+

How much proportionality in costs cases is there?

Reported cases since January 2018

- a) 1 - 10
- b) 11 - 50
- c) 51 - 100
- d) 100+

May 15 / Aug 16	303 / 24
Sept 16 / Dec 17	280 / 38
Jan 18 / Mar 19	186 / 19

Proportionality - Approach

Master Gordon-Saker

- ▶ Common and individual costs
- ▶ Pre-eminence within the 5 factors



Various
Claimants
v
MGN Ltd

Proportionality - Approach

HHJ Auerbach

- ▶ Consider relief first?



Sarah Jane
Reynolds
v
One Stop
Stores Ltd

Proportionality - Approach

HHJ Auerbach

“...the Court is simply applying, and then later reapplying, the same filter at two different stages.”

Sarah Jane
Reynolds
v
One Stop
Stores Ltd

Proportionality - Lownds Test

Master Gordon-Saker

“29. ...The first stage is to decide “whether *the total sum claimed* is or appears to be disproportionate.”

Clariss Powell
(acting in her own capacity
& as Co-Administratrix
to the estate
of Mikey
Powell & 7 Ors
V
Chief
Constable of
West Midlands

Proportionality - Lownds Test

Master Gordon-Saker

“32. ...Essentially therefore whether the costs claimed appear to be disproportionate is one of judgment and feel based on the experience of the costs judge deciding the question.

It probably goes without saying that, in deciding that question, a costs judge in 2018 must put out of mind the more stringent test of proportionality which has been in force for the last 5 years.”

Clariss Powell
(acting in her
own capacity
& as Co-
Administratrix
to the estate
of Mikey
Powell & 7 Ors
v
Chief
Constable of
West Midlands

Proportionality - 36.17(4)

Master McCloud

“...it is appropriate to disallow that sum if in all the circumstances the level of bonus is clearly disproportionate relative to the margin by which the offer was beaten, especially where a bill has been significantly reduced on assessment and where the margin by which the offer is beaten is small.”

JLE (a child
by her
mother &
litigation
friend ELH)
V
Warrington
& Halton
Hospitals
NHS
Foundation
Trust

Proportionality - Detailed assessment

Yip J

“...I stress that the exercise of the discretion in relation to proportionality is again at large.

For my part, without expressing any concluded view at all, I consider that the unfairness identified by [counsel] in applying what was probably a bad order, may have some bearing on the exercise of that discretion.”

Maiden
London Ltd
v
Ruddick &
Anor

Proportionality - Questions



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Proportionality

“It was expected that there would be a cluster of test cases in which the Court of Appeal would apply the new rule to different scenarios. That has not happened. The profession is becoming impatient. The remedy lies in their own hands. The Court of Appeal can only decide the cases which come before it.”



Proportionality

West & Demouilpied
v
Stockport NHS
Foundation Trust



Proportionality

“This masterly choice of phrase itself confers a degree of latitude on the assessing Judge in coming to a discretionary value judgment.

It is designed, it seems to me, to provide a temper to the rigours of the “trump card” status of proportionality, and its role as a safeguard for payers, so that, without detracting from that, it need not bear oppressively on payees.”

Sarah Jane
Reynolds
v
One Stop
Stores Ltd

Proportionality

“The touchstone is not the amount of costs which it was in a party’s best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances.”

Kazakhstan
Kagazy
V
Zhunus
[2015]
EWHC 404
(Comm)

Proportionality

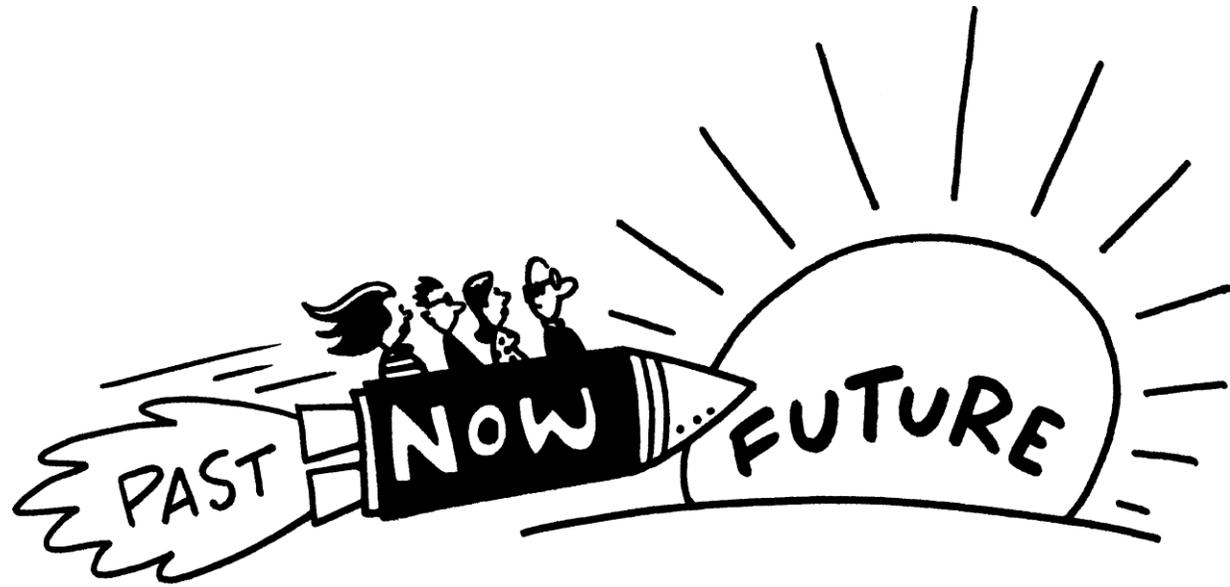
“In modern litigation, with the emphasis on proportionality...

the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial and the likely overall cost.

...seeking to curb the amount of work done, and the cost by reference to the need for proportionality.”

Stevens
v
Watts

(per
Lownds
v
Home
Office)



Clarity?

Advice?

New thinking?

Proportionality

Jason Rowley