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# Proportionality

Jason Rowley

# Proportionality - Questions



Is there any hope for clarity on proportionality?

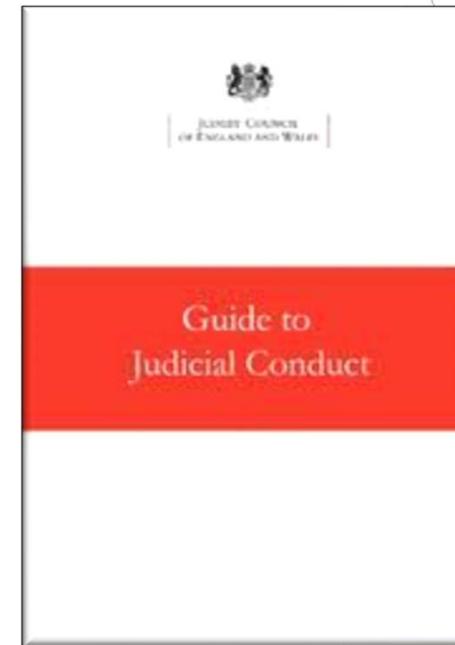
How are you to advise on proportionality?

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

## HHJ Auerbach

- ▶ “In short, it is quite clear that he considered that the costs were disproportionate to the sums in issue (about which he took a properly-reasoned view), and that this was not a case where the complexity of the litigation, additional work generated by the paying party’s conduct, nor any other factors in the Rule 44.3(5) list, had a countervailing impact, such as to lead to a different overall conclusion.”

Sarah Jane  
Reynolds  
V  
One Stop  
Stores Ltd

# Proportionality - Approach

## HHJ Auerbach

- ▶ “59 ...Rather, the Court is simply applying, and then later reapplying, the same filter at two different stages. At the assessment stage it does so with the benefit of different information, and bringing hindsight to bear, which it is entitled to do.”

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”. If the test were to be applied after decisions had been taken to reduce the costs, for whatever reason, the logical conclusion would be that the test should be applied only at the end of the line by line assessment.”

Claris 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.”

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of Mikey  
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V  
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Constable of  
West Midlands

# Proportionality - 36.17(4)

## Master McCloud

“43. To summarise my judgment:...I hold that the court should apply the test of ‘injustice’ separately for each part of rule 36.17(4) as well as in the round...and that where one is considering the 10% ‘bonus’ under sub-rule (4)(d) 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

“52 The Appellant contended that the Deputy Master took account of matters that were not relevant... Presumably, the implication...is that the D/M has arrived at an assessment that is too generous to the Respondents.

53 The Respondent contends that the D/M has reduced the total by 33 per cent without justification. The implication...is that her assessment was unduly mean to the Respondents.”

Maiden  
London Ltd  
V  
Ruddick &  
Anor

# Proportionality - Detailed assessment

## Yip J

- ▶ “59 ...I would urge the parties to consider whether they might now reach a sensible consensual resolution...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



Is there any hope for clarity on proportionality?

How are you to advise on proportionality?

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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

“Further, the overriding requirement is that the costs “bear a reasonable relationship” to the Rule 44.3(5) factors. 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

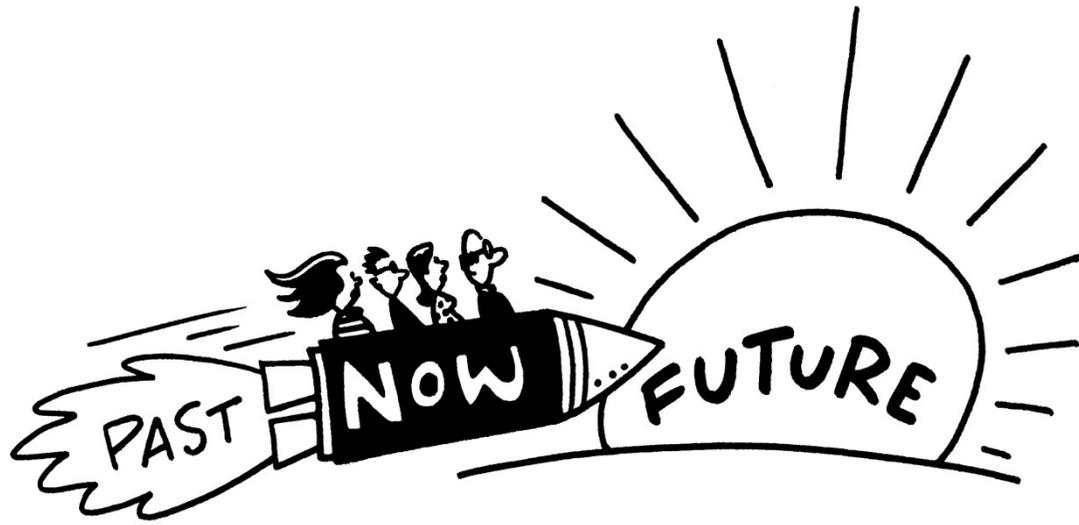
“The touchstone is not the amount of costs which it was in a party’s best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances.”

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

# Proportionality

*“In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, 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. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality.”*

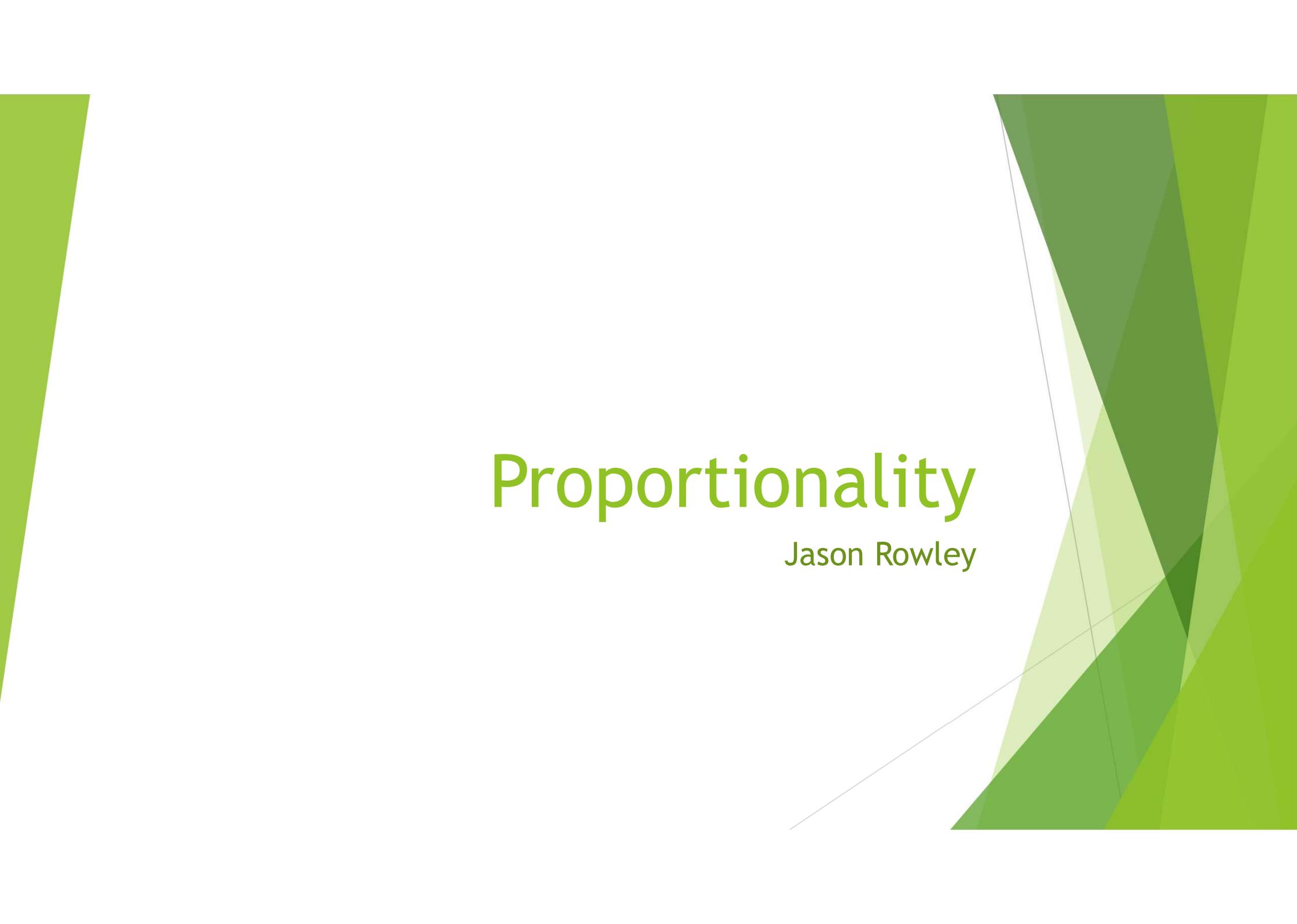
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v  
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Lownds  
v  
Home  
Office)



Clarity?

Advice?

New thinking?

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# Proportionality

Jason Rowley