

Proportionality & Vulnerability

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Proportionality

Pre April 2013

Previously...

Pre CPR – reasonableness only

Lownds v Home Office

Stevens v Watts

Proportionality

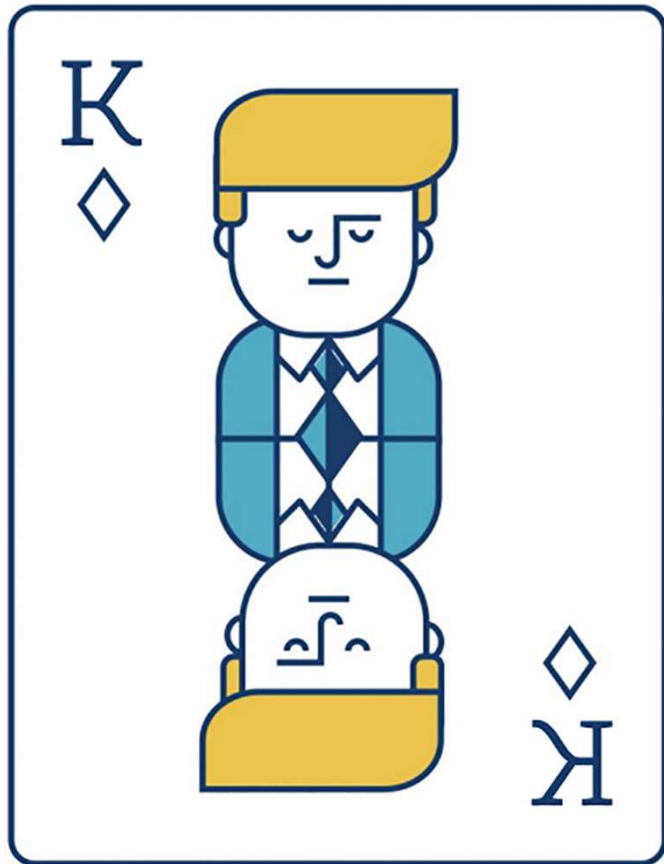
"In modern litigation, with the emphasis on proportionality...

Stevens
v
Watts

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.

(per
Lownds
v
Home
Office)

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



Proportionality

Post April 2013

LASPO - April 2013

Proportionality trumps reasonableness

44.3(5) and “Stepping back”

Proportionality – Post April 2013

“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 – Post April 2013

“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
(2018)



Proportionality II – Son of Proportionality?

Proportionality – a new Chapter?



“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.”

West v Stockport NHS Foundation Trust

81. ...whether, when considering proportionality, the judge needs to have regard to every item of cost, or whether there are some costs which ought to be removed from that part of the assessment. We consider that, when the judge comes to consider proportionality, there are some elements of costs which should be left out of account.

82. The exceptions are those items of cost which are fixed and unavoidable, or which have an irreducible minimum, without which the litigation could not have been progressed. Court fees are perhaps the best example.

West v Stockport NHS Foundation Trust

85. *We recognise that this means that, when undertaking the proportionality exercise, it is those elements of cost which are not inevitable or which are not subject to an irreducible minimum which will be vulnerable to reduction on proportionality grounds in order that the final figure is proportionate. Such costs are, however, likely to be costs which have been incurred as a result of the exercise of judgement by the solicitor or counsel. Those are precisely the sorts of costs which the new rules as to proportionality were designed to control.*

West v Stockport NHS Foundation Trust – Stage 1

89. *At the conclusion of the line-by-line exercise, there will be a total figure which the judge considers to be reasonable... That total figure will have involved an assessment of every item of cost...*
90. *The proportionality of that total figure must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total figure is found to be proportionate, then no further assessment is required.*

West v Stockport NHS Foundation Trust – Stage 2

...That should not be line-by-line, but should instead consider various categories of cost...or specific periods...or particular parts...

91. *...any reductions...should exclude those elements of costs which are properly regarded as unavoidable, such as court fees...*

92. *...looking at the different categories of costs...and considering... whether the costs incurred were disproportionate.*

... In that way, reductions...will be clear and transparent for both sides.



Vulnerability

Recommended by IICSA

Criminal Procedure

Family Procedure

Civil – not just CSA – requirements

Report – 155 pages - 02/20



**VULNERABLE WITNESSES AND PARTIES
WITHIN CIVIL PROCEEDINGS**

**CURRENT POSITION AND RECOMMENDATIONS
FOR CHANGE**

FEBRUARY 2020

Vulnerability

Overriding Objective

Participation of vulnerable parties or witnesses

1.6

Practice Direction 1A makes provision for how the court is to give effect to the overriding objective in relation to vulnerable parties or witnesses.

Vulnerability

Practice Direction 1A

1. The overriding objective requires that, in order to deal with a case justly, the court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence. The parties are required to help the court to further the overriding objective at all stages of civil proceedings.

4. Factors which may cause vulnerability in a party or witness include (but are not limited to)—

i. Age, immaturity or lack of understanding;

ii. Communication or language difficulties;

iii. Physical disability or impairment, or health condition;

iv. Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties);

v. The impact on them of the subject matter of, or facts relevant to, the case;

vi. Their relationship with a party or witness;

vii. Social, domestic or cultural circumstances.

Vulnerability

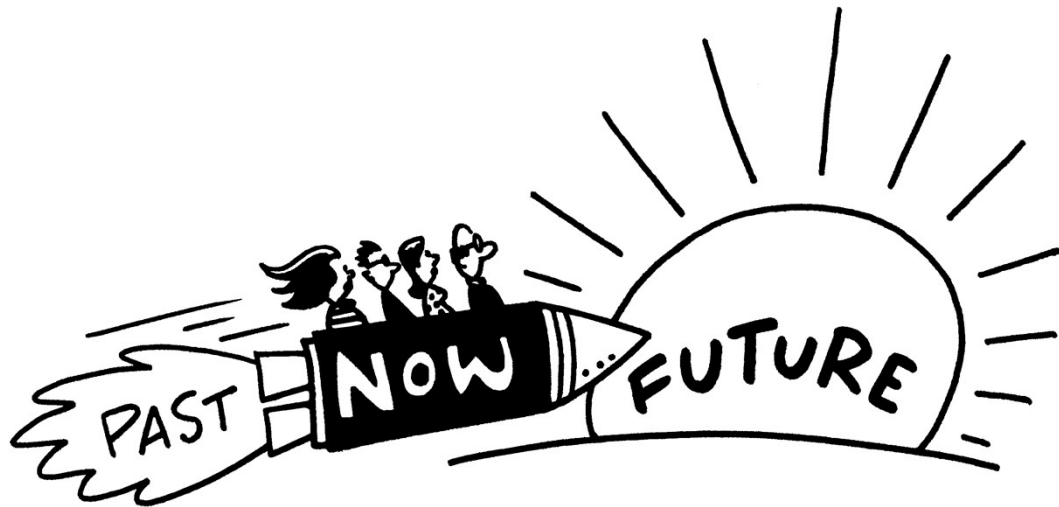
Proportionality & Vulnerability

CPR 44.3(5)

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

- (a) the sums in issue in the proceedings;
- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party,
- (e) any wider factors involved in the proceedings, such as reputation or public importance; and
- (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.

Proportionality & Vulnerability



What effect will 44.3(5)(f) have?

How likely are “vulnerability costs” to be incurred?

How will they be assessed?

Fixed costs

Proportionality in Action



Considering
proportionality
where there is
a CMO



Dealing with
every item in
an electronic
bill



The costs of
complying with
PD 510



Proportionality
– the future?

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