mistakenly electing the wrong route. It is surely undesirable for unjust enrichment law to subvert statutory liability in this manner.

Perhaps the result in *Deutsche Morgan Grenfell* can be explained by its unique facts: whilst the appellant company was entitled to make a group income election as a matter of EC law, it could not have done so at the relevant time even if it had tried. Both EC law and the justice of the case required a finding for the appellant. Lords Hoffmann and Walker achieved this by taking a purposive interpretation of the effect of the ECJ decision; Lord Hope, by expanding the law of unjust enrichment beyond its proper limits. Lord Scott, however, by taking a technical approach to both the ECJ decision and unjust enrichment, was unable to effect justice in the broader sense. If one accepts that the appellants should have won, the reasoning of Lords Hoffmann and Walker is preferable: it does justice on the facts whilst upholding a principled law of unjust enrichment.

Finally, the Lordships were invited to consider whether English unjust enrichment law should replace its system of unjust factors by a requirement that there be an "absence of basis" for the payment, a view advocated by the late Professor Birks (*Unjust Enrichment*, 2nd ed. (Oxford 2005)). Lord Walker, alone in expressing a view, inclined, *obiter*, towards welcoming such a change, but suggested that it would rarely make any difference to the outcome of cases. How would it have affected *Deutsche Morgan Grenfell?* It would certainly have produced a more focused analysis: without unjust factors the concurrent claims issue would disappear, so too the need to find a mistake. Instead attention would rightly be focused on understanding whether the ACT was due, the importance of which some of their Lordships failed to appreciate. However, the new approach would generate one problem of its own, for it is unclear whether a mistaken payer would benefit from the generous limitation period were the claim framed as "absence of basis". Despite this uncertainty, the new approach is attractive.

AMY GOYMOUR

ACQUITTING THE INNOCENT AND CONVICTING THE GUILTY - WHATEVER WILL THEY THINK OF NEXT!

UNTIL now, one aspect of our criminal justice system has been what might be called the "penalty shoot-out theory" of the trial. To win the match, the prosecution are allowed one shot at goal; and if their striker misses, however unluckily, they do not get another chance. Traditionally, this has been so even where the reason the prosecution fail to score is that the defence, having carefully "kept its powder dry"

until the trial, points out some technical deficiency in the procedure which, if noticed earlier, could easily have been corrected. When in consequence of this some obviously guilty person goes unmeritoriously free, lay people traditionally complain and say "We thought criminal justice was about acquitting the innocent and convicting the guilty". To this complaint, common lawyers traditionally reply that it is based on a misunderstanding of the adversarial tradition, which, unlike the inquisitorial tradition, is not concerned with establishing what continental lawyers call "material truth". The recent decision of the Divisional Court in *R. (D.P.P.)* v. *Chorley Justices and Forrest* [2006] EWHC 1795 (Admin) shows us that, in this respect, English criminal procedure has recently undergone a most dramatic change.

By way of an exception to the normal rule that all evidence must be given orally, the Road Traffic Act 1988 allows the prosecution in a drink-driving case to prove the blood alcohol level in the defendant's blood by producing a written certificate from the analyst. But in order to do this, they must formally serve the certificate on the defendant at least seven days before the trial. When Mr Forrest was prosecuted for driving with excess blood-alcohol, he pled not guilty and, at the pre-trial case management hearing, "reserved his defence". At the eventual trial, at which the prosecution produced the analyst's certificate rather than the analyst, Forrest submitted that the certificate was not admissible in evidence because it had not been served on him in strict compliance with the formalities the law requires. The justices accepted his submission, and dismissed the case. When the CPS, which thought the certificate had been served with due formality, asked them to state a case, they refused. Against this refusal the CPS went to the Divisional Court, which ordered the justices to state a case: and for good measure, it ordered Mr Forrest – who had resisted the application – to pay the costs.

In so deciding, the Divisional Court took the occasion to criticise in blunt terms the conduct of the case below, making it plain that the "penalty shoot-out theory" is now dead.

> [24] In April 2005 the Criminal Procedure Rules came into effect... They have effected a sea change in the way in which cases should be conducted, but it appears that not everyone has appreciated the fundamental change to the conduct of cases in the magistrates' courts that has been brought about by the Rules. The Rules make it clear that the overriding objective is that criminal cases be dealt with justly; that includes acquitting the innocent and convicting the guilty, dealing with the prosecution and defence fairly, respecting the interests of witnesses, dealing with the case efficiently and expeditiously, and also, of great importance, dealing with the case in a way that takes into account the gravity of the offence, the complexity of what is in

> issue, the severity of the consequences to the defendant and others affected and the needs of others. Rule 1.2 imposes upon the participants in a criminal case a duty to prepare and conduct the case in accordance with the overriding objective, to comply with the rules and, importantly, to inform the court and all parties of any significant failure, whether or not the participant is responsible for that failure, to take any procedural step required by the Rules.
>
> [25] Rule 3.2 imposes upon the court a duty to further that overriding objective by actively managing cases.

In the light of this, they said, Mr Forrest should have revealed his proposed defence at the case-management conference. And when, having "kept his powder dry", he had ambushed the prosecution at the trial, Chorley justices, instead of throwing out the case, should have granted an adjournment, so enabling the CPS to serve the certificate with the formalities which Mr Forrest claimed they had neglected.

By now, the non-specialist reader will probably be wondering where this revolution has come from. Who wrote the Criminal Procedure Rules? And who decided they should proclaim an "overriding objective" which turns previously treasured notions of the accusatorial tradition upside down?

In 2001, as part of his *Review of the Criminal Courts*, Sir Robin Auld recommended that the rules of criminal procedure be codified. In 2003, as a step in this direction, Parliament enacted Part 7 of the Courts Act, which set up a new and single Criminal Procedure Rule Committee, empowered to rewrite the existing jumble of secondary legislation on criminal procedure in the form of one single code. Under the energetic leadership of Lord Woolf, then Lord Chief Justice, this body carried out the initial codification exercise very quickly; and it also decided that these new Rules should, like the Civil Procedure Rules, begin with a statement of aims and objects, entitled "overriding objective". Of this, the key elements are paraphrased in the extract from the judgment quoted earlier in this note: in particular, the general aim that "criminal cases be dealt with justly" and, at the head of the list of what this means in concrete terms, "acquitting the innocent and convicting the guilty".

These moves attracted scant attention at the time, despite the Committee's attempts to publicise what it was planning. And if practitioners noticed them at all, most seem to have assumed that all this was fine words likely to make little difference, and in the courts it would be "business as before". But from the *Chorley Justices* case, and others too, it is now clear that Lord Woolf's "overriding objective" is making fundamental changes in the way that business in the criminal courts is conducted.

Although many groups and agencies are represented on it, the Criminal Procedure Rule Committee is dominated by the judiciary, and the ''overriding objective'' is their own attempt to reform criminal procedure so that it aligns more closely with the instincts of ordinary citizens as to what is just and fair. And, unlike the loudly-trumpeted attempts of our headline-hungry politicians to ''rebalance justice'', it looks as if this reform might actually achieve its authors' aim.

J. R. SPENCER

WHO OR WHAT IS A PARENT?

EXACTLY what it is which gives someone the claim to be regarded as a parent has perplexed academics for years. This question has now been confronted by the House of Lords in *Re G (Children)* [2006] UKHL 43, [2006] 1 W.L.R. 230.

A lesbian couple, CG and CW, lived together for seven years in the course of which CG gave birth to two girls with the aid of sperm donation. These girls were raised as children of the family. It was not disputed that the children had established an important relationship with CW and with CW's teenage son, also conceived through donor insemination during an earlier lesbian relationship. When the relationship between CG and CW broke down there was an acrimonious dispute over the two girls which led to applications for residence and contact. Both parties had by now acquired new partners and CG announced her intention to leave Leicester for Cornwall, a move thought to be designed to impede contact between CW and the children. CG, in breach of a court order restraining her from doing so, surreptitiously removed the children to Cornwall without informing CW. The court had made a time-sharing order set at 70% to CG and 30% to CW. CW had failed in her attempt to obtain a shared residence order in the lower courts but ultimately succeeded on appeal, the significance of which was that she thereby acquired parental responsibility for the children (Children Act 1989, s 12 (2)). Bracewell J. controversially reversed the court order and gave *primary* care of the children to CW. She regarded CW's relationship with the children as essential and she had no confidence that it would be maintained by CG if she and the children remained in Cornwall. The Court of Appeal dismissed CG's appeal rejecting the contention that there should be cogent reasons for preferring the claims of a person who was not a parent over those of a natural parent.

The House of Lords unanimously allowed CG's appeal, thus restoring CG as the primary carer. The House reasserted the authority