MUJI 2d Civil- The Long March

Francis J. Carney

It's unlikely that any of us expected to still be at this five years later when the Advisory Committee first met in April, 2003. Had I known what lay ahead, perhaps I would have declined the honor when John Young first contacted me about helping him revise the MUJI 1st. That entire project took us only about a year from start to finish. But for MUJI 2d we've spent over five years, with 53 meetings of the entire committee (some lasting an entire day, but most only two hours, dozens of subcommittee meetings, such as those for medical malpractice and products liability, and a constant stream of email correspondence. My firm's bookkeeper tells me that I have more than 200 unbilled hours into this project– that's both conservative (I don't write it all down) and typical of the other members of our group. So do the math– we could have hired one whopper of a professional instructions writer (if such a creature exists) for the volunteer hours that have gone into this project.[1]

The History of the MUJI 2d Committee

The Advisory Committee for MUJI 2d- Civil was appointed by the Supreme Court in early 2003 with the assignment to update MUJI 1st and to put the instructions in "Plain English." The Chair of the Advisory Committee, as with the original MUJI committee formed by the Litigation Section of the State Bar, was the estimable John Young. Tim Shea from the Administrative Office of the Courts has been the second pillar of the Committee. Our Committee consists of twelve practicing lawyers, one judge (Bill Barrett), a linguistics professor from the University of Utah (Marianna DiPaolo), and two staff members. The lawyers were

[1] 200 hours @ $250/hr comes to $50,000. That times the number of committee members comes to $750,000. And that figure doesn't include the time of dozens more lawyers who are not on the Advisory Committee but serve on the subcommittees.

chosen to be a representative sampling of respected members of the bar, representing both defense interests as well as their opposite numbers from the plaintiffs' bar. Professor DiPaolo has been highly useful in assisting us to rewrite instructions in a form that is more understandable to lay people. These are the present members of the Advisory Committee:

John L. Young (Chair)
Judge William W. Barrett
Juli Blanch
Francis J. Carney
Professor Marianna Di Paolo
Phillip S. Ferguson
Tracy H. Fowler
L. Rich Humpherys
Gary Johnson (replaced Paul Belnap in 2008)
Colin P. King
Stephen B Nebeker
Paul M Simmons
Peter W. Summerill (replaced Ralph Dewsnup in 2008)
David E. West
Jonathan G. Jemming (Staff)
Timothy M. Shea (Staff)

In each of the twenty-eight designated subject areas (medical malpractice, torts, contracts, etc.), we appointed subcommittees of four to eight attorneys who practice in the relevant area. For example, the medical malpractice subcommittee consists of myself, Elliott Williams, Pete Summerill (replacing Ralph Dewsnup) and Curt Drake (replacing Bob Morton). Those subcommittees were tasked with writing the first draft of the instructions in their subject areas for presentation to the entire Committee. Then the entire Committee takes over the review, revision, and publication to the web page.

What We've Done So Far

As I mentioned, over the past five years, we've had 53 meetings of the Committee. We've

had a day-long session for members of the committee and the subcommittees on the best ways to write "Plain English" instructions. So far, we've finished only five subject areas: General Instructions, Negligence, Tort Damages, Medical Malpractice, and Products Liability. We are now nearly finished with Commercial Contracts, and then will turn to Motor Vehicle Accidents and Premises Liability.

Why Is It Taking So Long?

Why has this taken so long? When can we expect the instructions to be completed? I get asked these questions many times, and there are several answers.

It's difficult to accurately restate complex legal concepts in Plain English. For example, as discussed below, we are doing without the word "proximate" cause. Yet every Utah tort case that addresses causation speaks of "proximate" cause– what seeds for potential problems are we sowing by eliminating the use of that word in instructions? It's true that not every statement of the law in a reported decision makes for a jury instruction, but could one not argue that eliminating the word "proximate" in the causation instruction gives rise to an appellate issue? There is a constant tension between using legal "code" words with which we are all familiar, and thus obscure to the layperson, and using Plain English, yet stating the law incorrectly.

Second, many of the core legal issues are undecided. There simply are not enough cases decided by Utah appellate court that tell us in what the law is in every area. Does Utah recognize a claim for "loss-of-chance" of recovery? Is the "reasonable alternative methods" an appropriate medical malpractice instruction where we have no reported case saying that it is the law in Utah? The Products Liability section took nearly an entire year to complete because of debate over uncertainties in the law. By way of example, I attach a randomly-selected copy of

the minutes from a meeting in late 2006.

And think of the prospect for a meeting without end with what amounts to an instructions conference with ten to fifteen lawyers, with no jury waiting for instructions. You can see how the deliberative process can go on endlessly, even among people of good faith.

Some of us were entirely disgusted by the pace of the project by early this year and so our leader, John Young (with hearty concurrence of the rest of the committee) decided to try to put an end to the analysis paralysis by enacting strict time frames. Better a good product soon than a perfect product years away. There were those– like me– who remain skeptical and think we should just hire a smart lawyer or two to write a complete set and dispense with the endless meetings. Nevertheless, we embarked on an ambitious program to complete the civil instructions by early 2009. Attached is a flow sheet of the new model for arriving at instructions.

We've fallen off track already, but we have finished Products Liability and Medical Malpractice in the first six months of 2008, with Commercial Contracts and Automobile Negligence soon to come. So while we may not meet our self-imposed deadline, I do expect that a good portion of the instructions will be up and available on the website by the end of the year.

Examples of Our Work

The Committee has dropped some of the familiar terms from MUJI 1st or JIFU, not without meeting some consternation from lawyers and judges. For example, studies have shown that jurors confuse "proximate" cause with "approximate," meaning close in time or place.[2] For that reason, California dropped the term "proximate cause" in their new model instructions, using

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[2]In *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991), California held that use of a "proximate cause" instruction constituted reversible error and should not be given in negligence actions.

just the term "cause."[3] Our Committee also rejected using "legal cause" because jurors, looking for fault, may look only for "illegal" causes. We decided, like California, to just use "cause," and therefore nowhere in MUJI 2d will you find the term "proximate cause."

MUJI 1st	**MUJI 2d**
3.13 PROXIMATE CAUSE (Alternate A) A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury. 3.14 PROXIMATE CAUSE (Alternate B) In addition to deciding whether the defendant was negligent, you must decide if that negligence was a ``proximate cause" of the plaintiff's injuries.  To find ``proximate cause," you must first find a cause and effect relationship between the negligence and plaintiff's injury. But cause and effect alone is not enough. For injuries to be proximately caused by negligence, two other factors must be present: 1. The negligence must have played a substantial role in causing the injuries; and 2. A reasonable person could foresee that injury could result from the negligent behavior.	CV209 "Cause" defined. I've instructed you before that the concept of fault includes a wrongful act or failure to act that causes harm. As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that: (1) the person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and (2) the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature. There may be more than one cause of the same harm.

[3]Instruction 430, Judicial Council of California Civil Jury Instructions (CACI) (Lexis-Nexis 2003). http://www.courtinfo.ca.gov/jury/civiljuryinstructions/faqs.htm has the link to a PDF of the complete set of the California instructions.

The negligence instructions were mostly rewritten and simplified. Some from MUJI 1st were dropped entirely, based on appellate decisions telling us that they should not be used. For example, MUJI 3.3 on "unavoidable accidents" has been dropped, in view of *Randle v. Allen*, 862 P.2d 1329 (Utah 1993) and *Green v. Louder*, 29 P.3d 638 (Utah 2001). Indeed, we have tried as much as possible to delete all "this-is-what-the-law-is-not" and other argumentative instructions.

MUJI 1st

3.2 RIGHT TO RECOVER FOR NEGLIGENT CONDUCT

A person has a duty to use reasonable care to avoid injuring other people or property. ``Negligence'' simply means the failure to use reasonable care. Reasonable care does not require extraordinary caution or exceptional skill. Reasonable care is what an ordinary, prudent person uses in similar situations.

The amount of care that is considered ``reasonable'' depends on the situation. You must decide what a prudent person with similar knowledge would do in a similar situation. Negligence may arise in acting or in failing to act.

A party whose injuries or damages are caused by another party's negligent conduct may recover compensation from the negligent party for those injuries or damages.

MUJI 2d

CV202 "Negligence" defined.

You must decide whether [names of persons on the verdict form] were negligent.

Negligence means that a person did not use reasonable care. We all have a duty to use reasonable care to avoid injuring others. Reasonable care is simply what a reasonably careful person would do in a similar situation. A person may be negligent in acting or in failing to act.

The amount of care that is reasonable depends upon the situation. Ordinary circumstances do not require extraordinary caution. But some situations require more care because a reasonably careful person would understand that more danger is involved.

Here is the revised burden of proof and preponderance instruction. Aside from the somewhat simplified language, we indicate that the judge *may* instruct the jury at the start of the case on the burdens and the elements. Think about it– why should they wait until they've heard all the evidence and only then be told what they are supposed to do with that evidence?

MUJI 1st

2.16 BURDEN OF PROOF

Whenever in these instructions it is stated that the burden of proof rests upon a certain party, or that a party must prove a certain proposition, or that you must find a certain proposition to be true, I mean that unless the truth of the allegation is proved by [a preponderance of the evidence] [clear and convincing evidence], you shall find that the same is not true.

2.18
PREPONDERANCE OF THE EVIDENCE

The term ``preponderance of the evidence'' means that evidence which, in your minds, seems to be of the greater weight; the most convincing and satisfactory. The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing character of the testimony, weighed impartially, fairly and honestly by you. If the evidence is evenly balanced as to its convincing force on any allegation, you must find that such allegation has not been proved.

MUJI 2d

CV117 Preponderance of the evidence.

When I tell you that a party has the burden of proof or that a party must prove something by a "preponderance of the evidence," I mean that the party must persuade you, by the evidence presented in court, that the fact is more likely to be true than not true.

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but I must emphasize to you that this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that a fact is more likely true than not, then you must find that the fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved, and the party has therefore failed to meet its burden of proof to establish that fact.

[Now] [At the close of the trial] I will instruct you in more detail about the specific elements that must be proved.

Concerns and Comments

1. I Can't Find the Instructions!

Although we've publicized the web site where the instructions can be found (several times), some people seem to have difficulty in locating MUJI 2d. I don't know the solution to this problem, other than continue to ask people to go to the courts website, and learn to create a bookmark. Here is the link: http://www.utcourts.gov/resources/muji/

2. Where's the Hard Copy?

Several judges have told me that things would be much easier if they had a paper copy, or even a disk of the instructions. To some extent, that latter problem can be solved by going to the web page for the instructions and copying and pasting them into your word processor.

But part of the concept behind MUJI 2d was that the instructions could be quickly corrected and revised, unlike the MUJI 1st instructions which haven't changed since 1993. We cannot do that if a hard-bound copy of the instructions is circulating, as any hard-bound copy would quickly become obsolete. Nevertheless, we've heard repeated requests for a paper copy and are considering providing all the judges with a looseleaf version of the instructions once they are substantially completed. Perhaps a publisher will have an interest in putting out a paperback version, as with MUJI 1st, but then periodic updates would also be necessary.

3. Are These "Official"?

Some seem to think that MUJI 2d is not "official" because it is not in print and that therefore MUJI 1st is the only "official" version. First, it needs to be noted that neither MUJI 1st nor MUJI 2d instructions are approved in advance by the Supreme Court. MUJI 1st was not "binding" on any judge and indeed contained errors in the law. In the same sense, MUJI 2d is not

"binding" on the trial courts– these are suggested instructions only. But they have been vetted by a dedicated committee of interested and knowledgeable lawyers, and are as good suggestions for instructions as can readily be found anywhere. And the Supreme Court, in its introduction to MUJI 2d, *has* given its imprimatur to the process:

> *The Utah Supreme Court approves this Second Edition of the Model Utah Jury Instructions (MUJI 2d) for use in jury trials. An accurate statement of the law is critical to instructing the jury, but accuracy is meaningless if the statement is not understood - or is misunderstood - by jurors. MUJI 2d is intended to be an accurate statement of the law using simple structure and, where possible, words of ordinary meaning. Using a model instruction, however, is not a guarantee of legal sufficiency. MUJI 2d is a summary statement of Utah law but is not the final expression of the law. In the context of any particular case, the Supreme Court or Court of Appeals may review a model instruction.*

4. It's Confusing to Have Both MUJI 1st and MUJI 2d.

We agree. But the alternative would have been to stick with MUJI 1st until MUJI 2d is finished, a process that may be another year or two down the line. After much discussion, we agreed to issue the instructions in piecemeal fashion with the completion of each section. Once a section is published on the web page, the judges and lawyers should no longer be using the corresponding section from MUJI 1st, no more than they would use JIFU.

5. Why Aren't They Sent Out for Comment Before Adoption?

Unlike proposed rules amendments, MUJI 2d instructions are not sent out for comment. I suppose if we wanted to delay the process even further, we could do that, perhaps over Tim Shea's protesting body. On the other hand, each instruction is already subject to revision and comment by fifteen to twenty lawyers before it is approved. We recognize that we will miss things and make mistakes, so we encourage lawyers to notify us with their criticisms and

comments by emailing Tim Shea.[4] As the Supreme Court's introduction to the instructions notes:

> *MUJI 2d is a continual work in progress, with new and amended instructions being published periodically on the state court web site. Although there is no comment period for jury instructions as there is for rules, we encourage lawyers and judges to share their experience and suggestions with the advisory committees: experience with these model instructions and with instructions that are not yet included here. Judges and lawyers who draft a clearer instruction than is contained in these model instructions should share it with the appropriate committee.*

We've heard some generalized kvetching, but received *no* specific comments or proposals for changes, as far as I know. If lawyers want to better the model instructions, they need to start by contacting the Committee.

Some Final Thoughts

We are not expecting to produce instructions that will be instantly understandable to the average non-lawyer on a jury. I doubt that this would be a realistic goal, and at least one expert in this field agrees:

> In the real world, perfect communication of legal concepts to every member of a jury is certainly impossible. The law is often complicated, time is short, and the educational level of jurors can vary substantially. Yet while complete understanding may be unrealistic, there is absolutely no doubt that we can explain the law to jurors much more clearly than we have done traditionally.

Peter M. Tiersma, *Communicating With Juries: How to Draft More Understandable Jury Instructions*, National Center for State Courts, Williamsburg, Virginia.

Last night at our monthly Committee meeting, as we were going over the proposed instruction defining substantive and procedural unconscionability, all of us were at sea on what the instruction meant. And we are supposed to be the pros– how then do we expect nonlawyers to achieve any degree of understanding when brand-new concepts of law are read to them at the end

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[4] tims@email.utcourts.gov

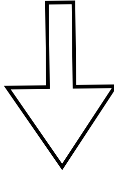
of a trial? Maybe we cannot. But I agree with Professor Tiersma that we can do better. And our Committee it committed to doing the best we can, with the hope that members of the Bar will assist us by providing insights and comments as work emerges.

Francis J. Carney
June 10, 2008

The 2008 Full Court Press to Finish the Civil Instructions

Drafting Committee

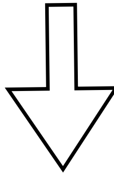
Four to six lawyers, at least one from the Advisory Committee, others just those who practice in the field. (Attempt is made to balance "plaintiff" and "defendant" types equally.)



Job is to write the instructions in a given subject area (e.g. medical malpractice) and make sure they are correct on substance and as clearly written as possible

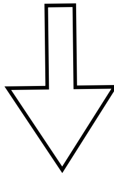
The Gang of Three

Three members of the Advisory Committee who were *not* on the Drafting Committee. Job is to review the Drafting Committee's instructions for clarity- should not be revising substance. Have ONE month to review them.



Entire Committee

Review the Gang of Three's recommended changes and approve instructions in ONE meeting- should not consider legal correctness of instructions, but only clarity and conformity with MUJI 2 style. (In theory.)



Publication via Web Site

Goal is to get all civil instructions completed by January 2009- one set a month

MINUTES
Advisory Committee on Model Civil Jury Instructions
December 11, 2006
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kamie F. Brown

Excused: John L. Young

Mr. Fowler, the chair of the Products Liability subcommittee, conducted the meeting in Mr. Young's absence. Mr. Fowler explained that the Products Liability subcommittee has been working on instructions in four areas: (1) strict liability, (2) negligence, (3) breach of warranty, and (4) defenses. Mr. Shea noted that the instructions will not be posted on the court's website for use until the whole section on products liability has been approved.

Draft Instructions

The committee reviewed the draft instructions on strict products liability.

1. *1001. Introduction.* Mr. Dewsnup did not like defining "defective" in terms of "a defect" and suggested revising the second paragraph to read: "A product may be defective in one or more of three ways." Others pointed out that the jury does not have to be instructed on all the ways a product can be defective but only on the way or ways at issue in the case. Mr. King suggested revising the instruction to read, "[Name of plaintiff] claims that the product is defective in [manufacture] [and/or] [design] [and/or] [because of a failure to adequately warn]." Other committee members pointed out that the instruction would then simply duplicate subsequent instructions on each type of product defect, which begin, "[Name of plaintiff] claims . . ." Mr. Fowler questioned whether the instruction was necessary.

Mr. Shea suggested bracketing "product" so that the court could use the name of the product instead. Mr. Fowler thought the practice should be consistent throughout the instructions.

Mr. Shea asked whether the comment was necessary, given courts' citations to the statute. Mr. Simmons pointed out that no Utah appellate court has squarely addressed the issue of whether those portions of the statute that were declared unconstitutional in *Berry v. Beech Aircraft* and never repealed or reenacted are effective.

Mr. Fowler asked if a reference to *Sanns v. Butterfield Ford* should be added to the last paragraph of the note. Mr. King and Mr. Simmons thought not, since the comment is merely talking about nomenclature and not the law of retailer liability.

Someone asked if there was a corresponding instruction in MUJI 1st. There is not, but the first paragraph of the comment has a counterpart in the comment to MUJI 12.12. Mr. Carney noted that the medical malpractice subcommittee is preparing a table cross-referencing MUJI 1st to MUJI 2d and explaining why some instructions in MUJI 1st are not included in MUJI 2d. The committee thought it would be a good idea to do the same for all instructions. Mr. Shea noted that the table should exist separately from the committee notes. The usefulness of the table will diminish over time, as courts and attorneys become more familiar with MUJI 2d and begin to use it exclusively. Mr. Fowler noted that MUJI 12.1 has not been replicated and that the subcommittee has avoided using "strict liability" in the text of the instructions.

Mr. Ferguson joined the meeting.

The draft instructions do not say that lack of privity and the exercise of reasonable care are not defenses. Mr. Simmons asked whether the committee had found that jurors are concerned about privity. The committee thought they were not. Mr. Fowler noted that an instruction on the exercise of care may be necessary where theories of strict liability and negligence both go to the jury. In those cases, the court and parties may need to craft an instruction explaining the difference between the two theories.

2. *1002. Strict liability. Elements of claim for manufacturing defect.* The committee noted that the comment to instruction 1002 applies to strict liability claims generally and not just to manufacturing defect claims. Mr. Fowler suggested moving the comment up to instruction 1001. Mr. Carney suggested making an introductory note for the whole topic. Mr. King and Ms. Brown noted that comments relevant to one theory of products liability may not be relevant to another and suggested having introductory notes for each subsection, such as one for strict liability and one for negligence.

Mr. King volunteered to have the subcommittee revise its notes.

Mr. Dewsnup expressed a concern about the structure of the instructions. He noted that the elements of a strict liability claim are (1) a defect, (2) that made the product unreasonably dangerous, (3) that was present at the time the product left the defendant, and (4) that caused the plaintiff's injuries. He thought there should be a generic instruction on the elements, followed by instructions defining each of the different types of product defects, followed by an instruction defining "unreasonably dangerous," followed by instructions on the other elements. Mr. Dewsnup thought that the first element as stated in instruction 1002 ("that a defect made the product unreasonably dangerous") should be broken out into two elements ("defect" and "unreasonably dangerous"). He also questioned whether the definition of "unreasonably dangerous" is different depending on the type of defect. Mr. Simmons noted that the elements as stated in instruction 1002 were taken from the Utah Supreme Court's statement of the elements of a strict liability claim. The committee thought, however, that it was not bound to state them in

the same language as the supreme court but could restate them to make them clearer to jurors. Ms. Brown defended the structure of the draft instructions, noting that the elements as stated in 1002 may not be helpful in a failure to warn case.

Mr. Shea volunteered to work with Ms. Brown to reformat the instructions in the way Mr. Dewsnup suggested so that the committee can compare the two approaches. Mr. Dewsnup offered to help.

The committee then focused on the language of instruction 1002. Mr. Dewsnup questioned whether "identical" should be "the same." Mr. Fowler did not think the distinction was significant or that any difference was intended thereby. Mr. Ferguson noted that most manufacturing has reasonable tolerances for variations.

Mr. King suggested that the subcommittee reconsider the issue.

Ms. Blanch was excused.

Mr. Ferguson noted generally that the products liability instructions seemed to be written for those with a higher level of education than those for whom the other instructions are written, which may be because the subject matter requires more sophistication.

3. *1003. Strict liability. elements of claim for design defect.* Mr. Dewsnup suggested that, for the sake of symmetry and simplicity, the instructions should refer to "design defect" throughout, rather "defective in design."

4. *1004. Definition of "unreasonably dangerous."* Mr. Nebeker questioned whether the notes should refer to "some subcommittee members." Mr. Dewsnup suggested saying, "There is an issue as to . . ." Mr. Carney suggested, "The drafting committee was not unanimous. The instruction should be reviewed with caution." Mr. Shea questioned whether there should be any note where some members merely disagree with a decision, such as *Brown v. Sears, Roebuck & Co.* Mr. Simmons pointed out that *Brown* is not a Utah decision but a Tenth Circuit decision and therefore is not a definitive statement of Utah law. Mr. Shea suggested saying, "Utah state courts are silent on the issue, but federal courts have said . . ." Mr. King suggested saying, "There is a question as to whether the Tenth Circuit's opinion of Utah law is correct." Mr. Fowler noted that the disagreements among committee members may be because there is no Utah law on point, or they may disagree on the interpretation of Utah law. After further discussion, the committee thought that it was appropriate to present alternative instructions for instruction 1004.

5. *1005. Strict liability. Elements of claim for failure to warn.* Mr. Dewsnup questioned whether the term "hazard" should be "risk." Mr. Ferguson thought the two terms

were not synonymous, that "hazard" refers to a potential mechanism of injury, and "risk" refers to the likelihood of the hazard occurring.

Mr. Fowler asked whether there needs to be a definition of what constitutes an "adequate" warning. Mr. Ferguson thought so. Some committee members thought that no definition of the adequacy of a warning could be given since it depends on the facts of the particular case. Mr. Carney suggested looking at the case law on the adequacy of warnings to determine the standard.

Mr. King offered to check the California pattern instructions (CACI) to see how they address the adequacy of a warning.

Mr. Dewsnup asked whether inadequate instructions for the use of a product are treated as a failure to warn.

6. *1008. Failure to warn. Presumption that warning will be read and heeded.* Mr. Shea questioned whether alternative instructions were necessary. The difference between the two alternatives is primarily on the question of whether the presumption arises for any warning (alternative A) or only for an adequate warning (alternative B). Mr. King noted that alternative A was based on comment *j* to the Restatement (Second) of Torts § 402A and suggested that the adequacy of the warning was not an issue at that time. Messrs. Carney, King, Simmons, and West all thought that an adequate warning is a prerequisite for the presumption to apply. Mr. Fowler thought there was some difference of opinion worth preserving but suggested that alternative instructions may not be the best way to present that difference.

7. *1011. Strict liability in tort. Component part manufacturer. Defective part incorporated into finished product.* Mr. Shea suggested presenting alternative instructions rather than burying the alternative in the note.

8. *1012. Defective condition of FDA approved drugs.* Mr. Dewsnup thought the presumption stated in this instruction should be rebuttable. Mr. Carney thought there should be no presumption, given the way the FDA works.

9. *1013. Defect not implied from injury alone.* Mr. Dewsnup noted that his subcommittees had made a concerted effort not to state the negative of propositions. He thought that instruction 1013 was improper and should not be given. Messrs. Carney, King, Simmons, and West agreed. Mr. Fowler suggested leaving the instruction in but including a warning against using it. Mr. Shea and Mr. Simmons thought that if the instruction were included, attorneys would think that the committee had endorsed its use.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, January 8, 2007, at 4:00 p.m.