Judicial Council Standing Committee on Model Utah Civil Jury Instructions

Agenda

January 9, 2023
4:00 to 6:00 p.m.
Via Webex

Welcome and Approval of Minutes	Tab 1	Alyson/Lauren
Prescriptive Easement draft instruction	Tab 2	Doug Farr
Evolving meaning of "reasonable"; discussion as to need for General Instruction	Tab 3	Bill Eggington
CV632 Threshold – caselaw and legislative update	Tab 4	Alyson McAllister
Progress on Instruction Topics	Tab 5	(Informational)

Committee Web Page

Published Instructions

Meeting Schedule: Monthly on the 2nd Monday at 4 pm

Next meeting: February 13, 2023

TAB 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
December 12, 2022
4:00 p.m.

Present: Judge Kent Holmberg, Lauren A. Shurman, Alyson McAllister, William Eggington, Ruth A. Shapiro, William Eggington, Douglas G. Mortensen, Randy Andrus, Mark Morris, Samantha Slark, Ricky Shelton, Adam D. Wentz, Jace Willard (staff).

Also present: Kade Olsen

Excused: Judge Keith A. Kelly, Stacy Haacke (staff).

1. *Welcome.*

Lauren Shurman welcomed the Committee.

2. *Approval of Minutes.*

October 3, 2022 meeting minutes approved.

3. *CV1605/1607 – Defamation – further explanation as to public comment.*

- Kade Olsen joined the meeting and explained his public comment regarding CV1605. Mr. Olsen explained that he spoke with David Reymann who assisted in drafting the instruction and, upon reflection, suggested that the committee modify 1607 rather than 1605. He suggested inserting the following language immediately before the last sentence of the currently drafted instruction: "When determining how a statement was 'actually understood,' you should consider how the statement would have been reasonably understood by the persons who heard or read it."
- William Eggington discussed the evolution of the meaning of the word "reasonable" and how it has changed over the years. Raised possibility that a judge might understand the meaning of the word one way and a jury a different way.
- Various committee members expressed their concern with the suggested revision to 1607 and asked clarifying questions to Mr. Olsen.
- Judge Holmberg expressed his belief that the suggested language is not an incorrect statement of the law, but that it may not be necessary in the instruction either.
- Ms. Shurman suggested adding the subject language as a committee note rather than incorporate it into the instruction.

- Mr. Shelton motioned to add the language into the existing committee notes as suggested by Ms. Shurman. Judge Holmberg seconded. The motion carried with one opposition from Ms. Slark.

4. *Avoiding Bias Instructions – Update regarding 11/21/22 Judicial Council feedback; next steps.*

- The instruction was presented to the Judicial Council. It was neither approved nor disapproved. Judge Pettit recommended at that meeting to send the instruction to the Board of District Court Judges for final review. The other option would be for the Committee to simply publish the instruction for public comment. It is ultimately the Committee's decision to make.
- Judge Holmberg suggested submitting it to the Board of District Court Judges to obtain a more comprehensive review of the instruction.
- Ms. Shurman will follow up with Judge Kelly to see if he will present the instruction to the Board of District Court Judges.

5. *New General Instruction – Pretrial Delay.*

- The Committee reviewed the most recent version of the instruction. There were no comments or recommended revisions.
- Mr. Andrus moved to approve. Doug seconded. The motion carried with no opposition.
- The Committee discussed where the instruction should be placed. Mr. Andrus suggested immediately after CV111B or CV135. Ms. Shurman suggested between CV116 and 117. Ms. Shurman also suggested it replace CV110, which has been removed. Ms. Slark suggested CV154.
- The Committee agreed to number the instruction CV154.

6. *CV632 Threshold – subcommittee or draft?*

- The Committee discussed whether a threshold instruction required a subcommittee or could be drafted by Ms. McAllister.
- The Committee agreed that Mr. Willard would obtain additional information from Ms. McAllister before the Committee would again address this question.

7. *Progress on Instruction Topics.*

Committee addressed upcoming queue. Dr. Eggington agreed to do additional research regarding the evolution of the word "reasonable" and distribute a relevant research article(s) to the Committee to review prior to next month's meeting.

8. *Adjournment*.

The meeting concluded at 5:15 PM.

TAB 2

CV____ Prescriptive Easement. Introduction.

A prescriptive easement arises when a non-owner has used real property in a particular manner for a long period of time without any objection from the land's owner. Utah law recognizes a prescriptive right for the non-owner to continue using the land in the same manner in order to prevent disputes after decades of amicable use.

In a prescriptive easement action, [Plaintiff] asserts that because [he/she/it] openly used the [Defendant's] real property for access for over 20 years that [he/she/it] should be granted a prescriptive easement across [Defendant's] property so that [Plaintiff] can continue using [Defendant's] property to access [an adjacent parcel]. [Defendant] asserts that [Plaintiff] has no right to enter or use [Defendant's] property to access [an adjacent parcel].

CV____ Prescriptive Easement. Elements of a claim.

To establish a prescriptive easement, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

1. That [Plaintiff] has been using [Defendant's] property for the purpose of accessing [an adjacent parcel];

2. That [Plaintiff's] use of [Defendant's] property was open and notorious;

3. That [Plaintiff's] use of [Defendant's] property was adverse;

4. That [Plaintiff's] continuously used [Defendant's] property for at least 20 years.

CV____ Prescriptive Easement. "Open and Notorious" Defined.

The "open and notorious" requirement means the use is "open and notorious" enough that the landowners could learn of it through reasonable diligence. *Judd v. Bowen*, 2017 UT App 56, ¶ 22, 397 P.3d 686, 694; *Jensen v. Gerrard*, 85 Utah 481, 39 P.2d 1070, 1072 (1935).

CV____ Prescriptive Easement. "Adverse" Defined.

There is a presumption of "adverse" use where a claimant has shown an open and continuous use of the land for 20 years. *Zollinger v. Frank*, 110 Utah 514, 175 P.2d 714, 716 (1946); *see also Jacob v. Bate*, 2015 UT App 206, ¶ 18, 358 P.3d 346. The burden is on the landowner to rebut the presumption of adverse use by "establish[ing] that the use was initially permissive." *Jacob*, 2015 UT App 206 at ¶ 19.

CV____ Prescriptive Easement. "Continuous" Defined

"Continuous" means the "use be as often as required by the nature of the use and the needs of the claimant." *Judd v. Bowen*, 2017 UT App 56, ¶ 16, 397 P.3d 686, 693 *(quoting Crane v. Crane*, 683 P.2d 1062, 1064 (Utah 1984)). The "continuous" requirement does not require frequent or

constant use. *Id*.

References:

Judd v. Bowen, 2017 UT App 56, 397 P.3d 686

Marchant v. Park City, 788 P.2d 520 (Utah 1990)

SRB Inv. Co., Ltd v. Spencer, 2020 UT 23, 463 P.3d 654

Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953)

Jacob v. Bate, 2015 UT App 206, 358 P.3d 346

Jensen v. Gerrard, 39 P.2d 1070 (Utah 1935)

Zollinger v. Frank, 175 P.2d 714 (Utah 1946).

TAB 3

'Reasonable man' and 'reasonable doubt': the English language, Anglo culture and Anglo-American law

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ABSTRACT This paper investigates, in a historical and cultural perspective, the meaning of the word *reasonable*, and in particular, of the phrases *reasonable man* and *reasonable doubt*, which play an important role in Anglo-American law. Drawing on studies of the British Enlightenment such as Porter (2000), it traces the modern English concept of 'reasonableness' back to the intellectual revolution brought about by the writings of John Locke, who (as Porter says) 'replaced rationalism with reasonableness, in a manner which became programmatic for the Enlightenment in Britain'. The paper also argues that the meaning of the word *reasonable* has changed over the last two centuries and that as a result, the meaning of the phrases *reasonable man* and *beyond reasonable doubt* has also changed; but since these phrases were continually used for over two centuries and became entrenched in Anglo-American law as well as in ordinary language, and since the older meaning of *reasonable* is no longer known to most speakers, the change has, generally speaking, gone unnoticed. On a theoretical level, the paper argues that meaning cannot be investigated in a precise and illuminating manner without a coherent semantic framework; and that a suitable framework is provided by the 'NSM' semantic theory.[1]

KEYWORDS reasonable doubt, reasonable man, natural semantic metalanguage, universal concepts, jury instructions

A REASONABLE MAN

The concept of 'a reasonable man' is one of the most important concepts in British and British-derived common law. Roughly speaking, 'a reasonable man' is, as a British judge famously put it, 'the man on the Clapham omnibus' – that is, an ordinary man, a humble commuter, who epitomizes an ordinary person's putatively sound judgement. 'A reasonable man' is not an intellectual, not a theoretician, and yet he is seen as someone whose judgement can be trusted – perhaps more so than that of a theoretician, a philosopher, a professional thinker or scholar.

There is of course a link – not only etymological but also semantic – between *reasonable* and *reason*. But the 'reason' attributed to 'a reasonable man' is not an abstract reason, linked with systematic thought, with sustained logical reasoning, with an ivory-tower search for knowledge or with hair-splitting speculations. The 'reason' of 'a reasonable man' is akin to

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common sense; and the 'reasonable man' himself is a 'common man', not a member of any elite.

The concept of a 'reasonable man' is democratic, as well as pragmatic: it is linked with the belief that most ordinary people are 'reasonable people', and that their thinking is essentially good and trustworthy – not because these ordinary people will always know the truth in some absolute sense, but because in most situations they will be able to think well enough for practical purposes.

While the concept of 'a reasonable man' is a vital legal concept it is not a purely technical one. If ordinary people like jurors could not understand this concept (via ordinary language) it could not play the role in law that it does. It is a concept which is expected, *inter alia*, to guide communication between the legal profession and 'ordinary people'. To make sense to ordinary people, the phrase *a reasonable man* (as it is used in law) must be intelligible to 'an ordinary man'.

With these points in mind, let us consider some definitions and explanations from a standard law textbook (Luntz and Hambly 1985), from a section entitled 'The Reasonable Person':

> The standard of care to be expected of a person subject to a duty of care depends on what *a reasonable person* would have done about a foreseeable risk of injury. … we need to consider more closely the nature of the 'prudent and reasonable man' to whom Alderson B referred ... In English jurisprudence this person has traditionally been described as 'the man on the Clapham omnibus' (the origin of the phrase attributed to Lord Bowen, 1903). (emphasis added)

Thus, 'a reasonable man (or person)' sets the standard of behaviour by which anyone's behaviour can – and should – be judged: this standard is not based on any empirical studies of most people's actual behaviour, and neither is it based on any opinion polls. It is a hypothetical standard: 'the standard of the "reasonable" person tends to be an idealised, ethical standard, rather than the behaviour of the actual "man in the street"' (ibid.).

A reasonable man's judgement is fallible, and reasonable men may disagree with one another. For example,

> The law reports in recent times have been filled with accounts of road accident cases. These illustrate that often the same facts are viewed differently by different judges concerned to determine culpability. It may seem remarkable that *reasonable men* should differ so often, and so markedly, as to what would in given circumstances be expected of *a reasonable man*. But this merely demonstrates that reasonable prudence is an indefinite criterion of conduct. From this appeals multiply: lawyers flourish. (ibid) (emphasis added)

Thus, any knowledge based on the hypothetical judgement of 'a reasonable man' can only be seen as probabilistic, limited, fallible. It is always open to debate and open to question. It is never definitive or absolute, and it depends on the circumstances. Take, for example,

> *Richards v State of Victoria* [1969] VR 136 (FC). A schoolboy was very severely injured when struck a blow in the classroom by a classmate, who was 18 years old, six foot (180 cm) in height and weighed 12 stone (76 kg). One major issue was whether the teacher should have prevented it. What would *the reasonable person* have done in the circumstances? It is accepted that in this context the man on the Clapham omnibus is irrelevant and the question becomes what *the reasonable schoolteacher* would have done. In this case the teacher was male; would it have made a difference if the teacher had been a woman? The teacher was 25 and 'no match physically for either' of the boys; can the court take into account the physique of the particular teacher or is *the reasonable teacher* assumed to be at least as big as the pupils? (emphasis added)

To say that the concept of 'a reasonable man' (as illustrated in these quotes) plays a key role in British and British-derived law, does not mean that it belongs only to the language of law and is not used or relied on in ordinary language. On the contrary, as corpora such as COBUILD demonstrate, it is also used widely in ordinary English – and, it appears, essentially in the same sense. For example (from COBUILD):

> To have been anything but satisfied would have been highly unreasonable, and Alistair, for a professor, was a rather *reasonable man*.
> Have no more fear of sleeping with your mother: How many men, in dreams, have lain with their mothers! No *reasonable man* is troubled by such things.
> …the stepfather seemed to take over the role of being the good and reasonable person in the house.

The history of the collocation *reasonable man* in English highlights the distance which separates the modern Anglo concept of 'reasonable man' as a pragmatic standard for human life and judgement (a paradigmatic modern juror) from the older concept of 'reasonable man' as a species endowed with reason (an equivalent of the Latin *animal rationale*). To quote some earlier examples:

> Man is a reasonable two footed beast. (Chaucer, 1374)
> Man, a reasonable creature, whose dignity doth come so near the Angels. (Kyd, 1588)
> Let your employment be such as may become a reasonable person. (Taylor, 1650)
> For man is by nature reasonable. (Burke, 1791)

The emergence of the modern concept of 'a reasonable man' is causally linked with the British Enlightenment. The Age of Enlightenment was seen, and saw itself, as The Age of Reason; 'reason' was clearly a key word and a key ideal of the period. As Isaac Watts proclaimed in the early eighteenth century, 'Reason is the glory of human nature' (quoted in Porter 2000: 48), and this statement was typical of his times. But the reason cherished by the most influential figures of the British Enlightenment was not 'pure reason', the reason of syllogisms, the reason of metaphysics and aprioristic logic, the reason of Descartes' 'homo rationalis'. It was a reason focused on empirical reality, on 'facts', on 'common sense', and on probabilistic thinking, not expecting absolute certainty in anything.

As in many other areas of modern Anglo culture, a key role must be attributed here to John Locke. As the British historian Roy Porter (2000) put it in his magisterial work *Enlightenment: Britain and the Creation of the Modern World*, 'Locke was far and away the key philosopher in this modern mould' (p. 60); 'his philosophy proved a great watershed, and he became the presiding spirit of the English Enlightenment' (p. 66). The fact that the word 'reasonableness' appeared in the title of one of Locke's major works (*The Reasonableness of Christianity*) is symptomatic of his impact on the English language. In Locke's book, the word *reasonable* was not yet used in any of the senses which it has now in either legal or ordinary language; and yet his view of 'reasonableness' – which linked it with 'mutual toleration' (1999: 120) and with 'diversity' ('since we cannot reasonably expect that anyone should readily and obsequiously quit his own understanding and embrace ours', Locke, 1959: 372) – has left a noticeable imprint on the subsequent history of the word *reasonable*. To quote Porter (2000) again:

> In stark contrast to Descartes, Hobbes and the other rationalists, Locke's truth claims were models of modesty. To the Galileo-idolising Hobbes, reason could range omnipotent; for Locke, any straying from the empirical straight and narrow led into mental minefields. While Hobbes proposed proofs *modo geometrico*, Locke saw no scope for Euclidian certainty. Man was a limited being, and reason just sufficient for human purposes. (p. 60)
>
> Locke shared Bacon's impatience with scholastic syllogisms which chopped logic 'without making any addition to it'. Empirical knowledge, by contrast, traded in honest matters of fact and though limited, could be cumulative and progressive. (p. 63)

Empirical, 'demonstrable' knowledge was only probable knowledge but it was nonetheless practically useful:

> While inevitably lacking the certitude of revelation or intuition, this formed the main stock of truth available to mortals. Locke agreed with Sydenhaus, Boyle, Newton, and their peers in stressing the limits of man's powers, but that was no insuperable problem: 'our business here is not to know all things, but those which concern our conduct.' (p. 63) Though 'demonstrable' knowledge, the harvest of experience, could never be more than probable, it was nevertheless useful and progressive. (p. 65)

The various quotes that Porter adduces from Locke's writings sound almost like sketches for a semantic history of the word *reasonable* – the new, post-Enlightenment meanings of this word can be seen here *in statu nascendi*. Not surprisingly, Porter's conclusion about Locke's impact is framed in precisely such terms:

> Alongside his defences of toleration and political liberty Locke thus set the enlightened agenda with his endorsement of the mind's progressive capacities. In dismissing Platonic and Cartesian *a priorism*, in asserting that knowledge was the art of the probable and in holding that the way forward lay in empirical inquiry, *he replaced rationalism with reasonableness* in a manner which became programmatic for the Enlightenment in Britain. (p. 66, emphasis added)

The British philosophical tradition that lies behind the folk-value of 'reasonableness' reflected in modern English is of course not restricted to Locke alone. It embraces several different (and often mutually critical) strands, including the seventeenth-century 'constructive scepticism' of John Wilkins (the founder of the Royal Society); Hume's 'naturalism' (which made room for beliefs that are not rationally justifiable but that nevertheless leave no room for doubt); and the Scottish 'common sense philosophy' of Thomas Reid. (see, for example, Ferreira 1986, Shapiro 1983 and 1991; Van Leeuwen 1963; Livingston and King 1976.) But Locke's impact on the general intellectual climate in both Britain and America was by far the greatest.

A key role in the evolution of the word *reasonable* was undoubtedly played by the emergence in the eighteenth century of the legal doctrine of 'beyond reasonable doubt' which I will discuss more fully in the section entitled 'reasonable doubt'. In that same section, I will comment on the link between the phrases *reasonable doubt* and *reasonable man* as they were used in Britain and America in the eighteenth century. I will discuss the meaning of *a reasonable man* in eighteenth-century English, and attempt to show that it represented an intermediate stage between Shakespeare's use and the twentieth-century use. For the moment, however, let me try to explicate its contemporary meaning.

The form of the explication presented below may strike readers who are unfamiliar with NSM semantic theory as highly unconventional. I hasten to reassure such readers that the theory will be explained in some detail below (see The Natural Semantic Metalanguage p.8, and also to point out that although this explication is unconventional, it is largely self-explanatory.

I think that X is a reasonable man. =
(a) I think about X like this:
(b) X can think well about many things
(c) when something happens to X, X can think well about it
(d) because of this, X can think about it like this:
'I know what is a good thing to do now'
'I know what is a good thing not to do now'
(e) if other people think about it for some time they can think the same
(f) when I think about X like this, I think: this is good
(g) I don't want to say more
(h) I don't want to say that X is not like many other people

Component (b), 'X can think well about many things', relates the concept *reasonable* (as used in the collocation *a reasonable man*) to *reason*, in the procedural sense: a reasonable man can think well. But the mention of 'many things' suggests, contrary to appearances, certain limitations on this ability: X's ability to think well is not absolute, but relative to the subject matter, contingent. While he is not a narrow specialist and can think well about many (different) things, X cannot necessarily think well about *everything*. He is not a 'thinker' *tout court* or a person of outstanding general intelligence; he is simply someone who can think well about many kinds of things, in many kinds of situations.

Hypothetical collocations like *a reasonable teacher*, quoted earlier, are *not* used in modern English in the same sense as *a reasonable man*. *A reasonable teacher* would have to mean *a reasonably good teacher*. A phrase like *a reasonable boss* (or employer) can have also another sense: roughly, a boss (or employer) who doesn't require too much from his or her subordinates (employees). But the phrase *a reasonable man* (or person) is different – partly because, unlike the other collocations with *reasonable*, it refers to the ability to think well about 'many things'.

Component (c), 'when something happens to X, X can think well about it', links X's ability to think well with his experience: his is not necessarily an ability to think well about abstract problems, or about logic, but an ability to think well in concrete situations, when something happens to him.

Component (d), 'because of this, X can think: I know what is a good

thing to do now, I know what is a good thing not to do now', links X's ability to think well with an ability to know what to do, and what not to do, in a given situation ('now'). The standard set by the 'reasonable man' has to do with human conduct, not with thinking about the universe, or about formal logic. It also has to do with an ability to think about a particular set of circumstances: X can know what to do, and what not to do, in a particular situation because X is good at thinking about particular situations (as indicated in component (b)). The negative component, 'X knows what … not to do', is important, because it implies that X will not do anything foolish or extreme that someone intelligent but not 'reasonable' might do.

Component (g), 'I don't want to say more', introduces an element of limitation: the speaker does not want to present X as an intellectual giant, standing head and shoulders above other people. On the contrary, the speaker is keen to portray X as an ordinary person; or rather, to avoid creating an impression that X is necessarily someone outstanding. Hence component (h): 'I don't want to say that X is not like many other people'.

In fact, it is important for the speaker to validate X's judgement with reference to other people. Since the speaker does not say that X *always* thinks well (about *all* matters) and since he/she explicitly denies that X is someone outstanding, where else could the speaker's trust in X's judgement come from? Component (e) suggests that it comes precisely from the speaker's trust in ordinary people's capacity to arrive at a sound judgement. But of course there is no guarantee that having considered the matter other people will think the same as X does (about what is a good thing to do in that particular situation), though they certainly *can* come to the same conclusion: (e) 'if other people think about it for some time they can think the same'.

The overall evaluation (component (f)) is optimistic: 'I think that this is good'. The grounds for optimism are limited, for the speaker does not say that X actually *knows* what is a good thing to do (or not to do), or that other people will *necessarily* agree. Yet limited as human knowledge is – empirical, probabilistic, prone to error – in most situations, for most practical purposes, 'a reasonable man' can make 'a reasonable judgement', and, from the cultural point of view reflected in the phrase *a reasonable man*, 'this is good'.

As a whole, this explication reflects the British empirical tradition with its emphasis on the link between good thinking and experience and on practice rather than theory; and it also reflects the faith in democracy and in the trustworthy (if not infallible) judgement of 'ordinary people'.

Let me close this section with a characteristic and telling quote from a pamphlet entitled 'The law and the reasonable man' published by the British judge Lord Reid (and originally delivered as a lecture at the British Academy):

> We are a democracy and I would say that a large majority of the voters are, as individuals, reasonable men and women … The law departs at its peril from the views of the reasonable man. He could not give a definition of what he means by justice and neither can I. But that does not prevent him from saying that particular things are clearly unjust. We as lawyers and legislators can go far but we cannot afford to go so far that we offend his sense of justice. We may try to educate our masters, but we shall do incalculable harm if we try to override the views of the average reasonable man. (Reid 1968: 204–5)

THE NATURAL SEMANTIC METALANGUAGE

To be able to explore meaning in an effective and illuminating way one needs a coherent semantic theory and an effective methodology. As mentioned earlier, this paper is based on the semantic theory whose name comes from the initials of the name of its main tool: the Natural Semantic Metalanguage (NSM). This theory, whose main ideas were first presented in English in my 1972 book *Semantic Primitives*, has since been developed in collaboration with my colleague Cliff Goddard, and with valuable input from other colleagues (see Wierzbicka 1996, Goddard 1998, Goddard 1997 (ed.), Goddard and Wierzbicka 1994 (eds) and 2002). It has also been extensively tested in practice, through empirical study of a large number of diverse languages, and is now supported by a large body of semantic descriptions of aspects of many languages, carried out within the NSM framework.

The NSM approach to linguistic description is based on two fundamental assumptions: first, that every language has an irreducible core in terms of which the speakers can understand all complex thoughts and utterances, and second, that the irreducible cores of all natural languages match, so that we can speak, in effect, of the irreducible core of all languages, reflecting the irreducible core of human thought.

As Leibniz argued eloquently three centuries ago, not everything can be explained: at some point, all explanations must come to an end, for a *regressus ad infinitum* explains nothing. Some things must be self-explanatory (intuitively clear), or we could never understand anything. The explanatory power of any explanation depends therefore on the intuitive clarity of the indefinable conceptual primes, which constitute its ultimate foundation.

A natural language is a powerful and rich system in which very complex and diverse meanings can be formulated and conveyed to other people. In the NSM theory of language it is assumed that the intelligibility of all such meanings depends on the existence of a basic set of conceptual primes which do not require any explanations for they are intuitively clear to us (and presumably innate); and which constitute the bedrock of human communication and cognition. Cross-linguistic empirical work undertaken within the NSM framework suggests that there are some sixty universal conceptual primes. They are set out in Table 1.

Table 1 Universal Semantic Primes, English version

Substantives:	I, YOU, SOMEONE (PERSON), SOMETHING (THING), PEOPLE, BODY
Determiners:	THIS, THE SAME, OTHER
Quantifiers:	ONE, TWO, SOME, MANY/MUCH, ALL
Intensifier:	VERY
Attributes:	GOOD, BAD, BIG, SMALL
Mental predicates:	THINK, KNOW, WANT, FEEL, SEE, HEAR
Speech:	SAY, WORDS, TRUE
Actions, events, movement:	DO, HAPPEN, MOVE
Existence, and possession:	THERE IS, HAVE
Life and death:	LIVE, DIE
Logical concepts:	NOT, MAYBE, CAN, BECAUSE, IF
Time:	WHEN (TIME), NOW, AFTER, BEFORE, A LONG TIME, A SHORT TIME, FOR SOME TIME
Space:	WHERE (PLACE), HERE, ABOVE, BELOW, FAR, NEAR, SIDE, INSIDE, TOUCHING (CONTACT)
Taxonomy, partonomy:	KIND OF, PART OF
Augmentor:	MORE
Similarity:	LIKE (HOW, AS)

The first hypothesis, then, is that all languages have lexical exponents for each of the sixty or so conceptual primes (words, bound morphemes, or fixed expressions). The second, concomitant, hypothesis is that in all languages conceptual primes can enter into the same combinations. Of course the word order and the morphosyntactic 'trappings' may differ from language to language, but the hypothesis is that the elements, their combinations, and their meaning will be the same. (See Goddard and Wierzbicka (eds) 2002.) This means that just as we can have a rudimentary universal lexicon of indefinable concepts we can also have a rudimentary universal grammar of such concepts. And if we have a mini-lexicon and a mini-grammar then we can have a mini-language – a mini-language carved out of natural languages which can be used for the description and comparison of languages, in their lexicon and grammar, and also in their discourse practices: in short, a 'natural semantic metalanguage' (NSM).

Since this metalanguage is carved out of natural language (any natural language), the semantic explications and scripts constructed in it are intuitively meaningful and have psychological reality. Consequently, unlike semantic formulae based on various artificial formalisms, NSM formulae are open to verification (they can be tested against native speakers' intuitions). Being based on the shared core of all languages, the Natural Semantic Metalanguage can serve as a 'cultural notation' for the com-

parison of cultural values, assumptions, norms and ways of speaking across the boundaries between societies, communities, subcultures, and epochs. This applies also to Anglo culture and other cultures and subcultures dependent on the English language.

But to explore English in depth from a semantic perspective one needs a well-grounded semantic theory and an effective methodology. In most recent books on English, which in principle are not inimical to semantic considerations, such a theoretical and methodological foundation is lacking. As a result, if they do discuss the meaning of English words, expressions, or constructions, they usually do so on an *ad hoc* basis. This can also be valuable, but it is not enough for a systematic and precise investigation of meanings, changes in meaning and differences in meaning. Without such a systematic and methodologically informed investigation of meaning, however, it is not possible to investigate, in a systematic and rigorous way, the cultural underpinnings of English key words, their history, and their role in Anglo culture in general and in Anglo-American law in particular.

REASONABLE DOUBT

The momentous phrase *beyond reasonable doubt* entered the English language some time in the seventeenth century (Van Leeuwen 1963, Shapiro 1983) and became well established in the eighteenth century. As noted by Morano in his important paper 'A Re-examination of the Reasonable Doubt Rule' (1975), it was used in the Boston Massacre trials of 1770, where the prosecution appealed to the jury's 'Cool and Candid Reason', telling them that if the 'Evidence is not sufficient to Convince beyond reasonable Doubt', the accused must be acquitted. At the same trials, a judge instructed the jury in the following words: 'If upon the whole ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of the law, declare them innocent' (Shapiro 1991: 22).

The phrase *any rational doubt* was also used in other late eighteenth-century trials, for example, in the so-called Irish trials of 1795, as was also the phrase *rational men*. But eventually, the language of *reasonable doubt* replaced that of *rational doubt*, and it was often linked with the phrase *reasonable men*.

Thus, in the Trial of Weldon (1795) the judge indicated that if the jury had 'any rational doubt' in their minds they must acquit. Another judge said that if the jury felt 'such a doubt as reasonable men entertain', they had to acquit. In another trial of the same year (Trial of Leary), the judge told the jury that they must acquit 'if you should have any doubt, such as reasonable men may entertain'; and in the Trial of Glenman (1796) the judge used jointly the following formulations: 'if you have a reasonable doubt' and 'you are rational men' (Shapiro 1991: 23).

Thus, both *rational* and *reasonable* were used at the time, in similar

contexts; and two centuries later, the two words are still used interchangeably in some scholarly commentaries on the history of the notion of 'reasonable doubt' in Britain and America. In fact, however, the two words did not mean the same and, as Porter (2000) notes in his book on the British Enlightenment, the victory of *reasonable* over *rational* was highly significant. I would add that no less significant were the changes in the meaning of the word *reasonable* itself; and I will argue that the phrase *beyond reasonable doubt* has also changed in meaning, and that due to its continuous use over more than two centuries, this fact has largely gone unnoticed.

What was the difference in meaning between the two phrases: *rational men* and *reasonable men*, as used for example in late eighteenth-century instructions to jurors? Roughly speaking, it appears that the phrase *reasonable men* limited the expected 'good thinking' to the domain of a person's experience and at the same time implied confidence in that experience as a possible source of practical wisdom (or 'prudence'). To quote Morano (1975: 514), 'the concept of the "reasonable man" – whose conduct was the standard against which allegedly negligent actions would be judged – developed during the eighteenth century' … the concept of the "reasonable man of ordinary prudence" was first mentioned in a 1738 English case'.

Thus, when the model of *a reasonable man* was set before the eighteenth-century jurors, I would hypothesize that it was understood along the lines of the following formula:

a reasonable man (18th century)
(a) I think about this man like this:
(b) this man can think well about many things
(c) when something happens to this man
[e.g. when this man sees or hears something]
this man can think well about it
(d) because of this, this man can think about it like this:
I know what is a good thing to do now
I know what is a good thing not to do now
(e) if other people think about it for some time they can think the same
(f) when I think about this man like this I think: this is good

Apparently, then, it was assumed that *a reasonable man* can think well about many things (but not about all things), and that he can evaluate his own experience and is able on this basis to reach good decisions. On the other hand, the eighteenth-century model of *a reasonable man* did not yet necessarily include the assumption that *a reasonable man* was an ordinary person (the average commuter on the Clapham omnibus). Accordingly, the

last two components of the explication given previously ((g) 'I don't want to say more', (h) 'I don't want to say that X is not like other people') have not been included here.

In the new jury system which developed during the eighteenth century, 'jurors sit as fact evaluators who assess both the direct testimony of eyewitnesses and indirect circumstantial evidence. The beyond reasonable doubt doctrine evolved as judges came to inform jurors that they must evaluate the testimony of witnesses.' (Shapiro 1991: 244). To evaluate the testimony of witnesses and the circumstantial evidence means to think well about what one hears and what one sees, and to draw from this appropriate conclusions.

From their evaluations, jurors were expected to draw inferences. Since they were no longer (as in earlier centuries) 'important local men who presumably would possesss the requisite local knowledge' but rather, evaluators of evidence, 'jurors by that time could make little claim to independent knowledge, that is, to knowledge brought to, rather than gained in, the courtroom'. The knowledge gained by the jurors in the courtroom was limited; and it relied on their judgement.

In the older jury system, jurors had to rely, above all, on their conscience and personal beliefs. For example, Shapiro (1991: 260) notes 'in the Trial of Sir Thomas More (1535) jurors were told that the decision about witness credibility rested on the "conscience and discretion" of the jury … More was informed by the judge that the jury had found him "Guilty in their Conscience".' In the new system, which developed in the eighteenth century, jurors were no longer seen as 'good men and true' (as Shakespeare puts it in *Much Ado about Nothing*), that is, as people who could rely on their own knowledge and conscience. Instead, they were people who had to rely on the careful, critical and conscientious consideration of evidence. To quote Shapiro (1991: 245) again:

> The language of satisfied conscience conceivably might have been useful even when jurors thought of themselves as self-informing, but the beyond reasonable doubt language suggests a standard to be attained after a rational consideration of evidence. … Armed with the formula 'beyond a reasonable doubt and to a moral certainty' and a circumstantial evidence doctrine to replace the self-knowledge that had itself replaced God's knowledge, the criminal trial jury thus could maintain its role as the central actor and legitimator of the Anglo-American justice system.

It is widely accepted that the legal principle of 'beyond reasonable doubt' is closely linked with the philosophical ideas which developed in England at the end of the seventeenth century (in particular, but of course not only,

Locke's ideas). Morano (1975: 513) puts it as follows:

> The philosophical origins of the reasonable doubt rule can be traced to late seventeenth century England. During that period, a group of English philosophers – including John Wilkins, Robert Boyle, Joseph Glanville and John Locke – rejected the prevailing doctrine that equated moral certainty with absolute certainty. This group argued that one could not be absolutely certain of anything and that the concept of moral certainty could not demand such a high degree of proof. Instead, moral certainty required only that one have no reasonable doubts about one's beliefs.

As Shapiro (1991) documents, from Sir Geoffrey Gilbert's authoritative *Law of Evidence* (1770) onwards, the development of the beyond reasonable doubt principle was linked in particular with Lockean empirical philosophy and with Locke's conception of degrees of probability. Justified in these terms, this principle provided a secular moral standard on which, it was felt, law could be based in the Age of Reason. It was also a concept which by the late eighteenth century had reached the educated public, first in Britain and later in America, and become part and parcel of public discourse – and of the modern English language.

Given how entrenched the concept has become in English – not only in the legal system and in philosophical discussions but also in popular thinking – it is important to recognize that the meaning of the phrase *beyond reasonable doubt* has changed by imperceptible stages in the course of the last two centuries.

At the time when the phrase *beyond reasonable doubt* entered the English language the word *reasonable* applied to people's thoughts did not mean exactly the same as it does today. Today *reasonable* readily combines with verbs and nouns implying an absence of conviction (e.g., it is reasonable to suppose / assume / wonder / fear / speculate / hypothesize, etc.), and older collocations like *reasonable conviction* sound odd today – precisely because they are not compatible with an absence of conviction, a non-committal implied today by the word *reasonable*. But when at the end of the seventeenth century, John Tillotson, the Archbishop of Canterbury, argued that 'The laws of God are reasonable, that is, suitable to our nature and advantageous to our interest' (quoted in Porter 2000: 3), he was clearly indicating conviction, not a lack of conviction – and the sentence sounds odd today.

At the end of the eighteenth century, when the phrase *reasonable doubt* took root in the English language, and the doctrine of beyond reasonable doubt, in Anglo-American law, phrases like *reasonable conviction* or *reasonable belief* were still common, as was indeed the phrase *reasonable certainty* – not in the modern sense of 'I'm reasonably certain', that is 'not

quite certain', but on the contrary, in the sense of 'quite certain'. To quote a legal document from as late as the mid-nineteenth century (quoted in Shapiro 1991: 24): 'the evidence must establish to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment… This we take to be proof beyond a reasonable doubt.'

As pointed out by Morano (1975), the 'beyond reasonable doubt' test was originally introduced by the prosecution, and it was actually designed to provide less protection to the accused than the earlier 'any doubt' test, which did not require that doubts be reasonable.

> The reasonable doubt rule had the effect of reducing the prosecutor's burden of proof in criminal trials … It informed the jurors that they needed to be persuaded only beyond reasonable doubt – not beyond any doubt. … the rule helped reduce the potential for irrational acquittals and to that extent operated to the prosecution's advantage (Morano 1975: 515).

In the first half of the eighteenth century, that is, before the reasonable doubt rule was adopted, the jurors' personal 'belief' and 'satisfaction' (as well as 'conscience') were seen as the decisive factors. 'A guilty verdict was appropriate if the jurors "believed", an acquittal if they were not satisfied.' (Shapiro 1991: 20). In the second half of the century, judges still made appeals to the jurors' 'belief' ('most cases … still exhibited the familiar formulas emphasizing belief', ibid.). While the words *mind*, *understanding* and *judgement* started to be used more frequently than *belief* and *conscience*, the new language of 'understanding' and 'judgement' did not imply that rational arguments were to *replace* personal belief. As one judge put it, 'the understandings of the jury must be "absolutely coerced to believe"'(Shapiro 1991: 20).

Thus, the shift from 'any doubt' to 'any reasonable doubt' did not mean that the requirement of subjective personal conviction was to be *replaced* with objective rational arguments ('reasons'), but rather, that it was to be supplemented in this way. *Reasonable doubt* implied 'reasonable belief', and not merely 'a tenable line of argument', as it might today.

Morano's re-examination of the reasonable doubt rule is consistent with the semantic observations made here. In present-day English, the phrase *beyond reasonable doubt* suggests a doubt that can be weak and hypothetical, and it implies that even a weak and hypothetical doubt should be able to be rejected (before the verdict guilty can be reached); arguably, then, it provides more protection for the accused, not less. (See, however, Solan 1999). By contrast, at a time when *a reasonable doubt* could be taken to refer to strong personally held doubt the proviso could have indeed worked against the interests of the accused: it implied that

even a strong personally held doubt (with respect to the prosecution's case) was not sufficient, that reasons were needed as well.

Reasonable doubt was initially expected to be 'serious' and 'substantial', as well as real (that is, actually held). As a judge put it to the jurors in the 1798 American trial of Matthew Lyon, 'you must be satisfied beyond all reasonable substantial doubt that the hypothesis of innocence is unsustainable' (Shapiro 1991: 24). Half a century later, in the Commonwealth vs. Harman trial in Pennsylvania, the court defined *reasonable doubt* as 'serious and substantial – not the mere possibility of a doubt' (Morano 1975: 522). But in twentieth-century usage, *reasonable doubt* is no longer understood as necessarily 'serious and substantial'.

For example, in the legal thriller entitled *Beyond Reasonable Doubt* (Friedman 1990) the author, a practising attorney, has his lawyer for the defence address the jurors as follows:

> When it's over, you take the prosecution's claim, and you take the evidence, and you ask yourself, 'Do I have any doubt that this happened exactly the way the prosecutor said it did? And if you have any doubt, then you have to acquit Jennifer Ryan. Not a big doubt. Just a *reasonable* doubt.
> The judge is going to tell you about that, too. He'll tell you a reasonable doubt is any doubt you can assign a reason to. That doesn't mean a detailed reason like a specific theory of how the crime happened or who did it. It means any reason you might have, to doubt any part of what the prosecution is telling you. To doubt the elements that make up his case, or to doubt the conclusion he wants you to reach. Any reasonable doubt at all. (p. 481)

It is striking how close Friedman's 'reasonable doubt' comes to 'any doubt' – at least any doubt for which some logically defensible reason can be offered:

> Proof beyond a reasonable doubt is not proof beyond any doubt or proof beyond the shadow of a doubt. A doubt is reasonable if it is a doubt for which a reason can be given, a doubt which a reasonable person would have, acting in a matter of this importance. (p. 506)

The claim that *a reasonable doubt* is 'a doubt which *a reasonable person* would have' comes, I believe, from the earlier legal tradition; but the assertion that 'a doubt is reasonable if it is a doubt for which a reason can be given' does capture a real component in the present-day meaning of the phrase *a reasonable doubt*. In fact, it is one of the components which would distinguish the meaning of this phrase from that of the phrase *a reasonable man*: as mentioned earlier, 'a reasonable man' does not need to be

able to say why he thinks what he does, an intuitive sound judgement (as to what ought to be done in a given situation) may be sufficient for 'a reasonable man'. But an intuitive doubt would not be sufficient to qualify as *reasonable doubt*: it must indeed be 'a doubt for which a reason can be given'.

In eighteenth-century usage the principle of beyond reasonable doubt was also linked with statable reasons, but was not limited to them; rather, it was still linked with the notions of conscience and moral certainty. For example, in the 1796 (Irish) Trial of Glennan the judge told the jury that they should acquit 'if you have a reasonable doubt, not such as the idle or fanciful may take upon remote probabilities, but such as cannot satisfy your judgement upon your oath. (…) You are rational men and will determine according to your consciences, whether you believe these men guilty or not'. As Shapiro (1991: 23), who quotes this passage, comments, 'Here the languages of belief, the satisfied conscience, and beyond reasonable doubt are all linked together'.

It is worth pointing out in this context that in eighteenth-century trials the phrase *reasonable doubt* was often linked syntactically with someone's (a juror's) personal belief: the question was not whether '*there is* a reasonable doubt', but whether '*you have* a reasonable doubt' (or: 'if *you are in* any reasonable doubt'). Today, the phrase *if you have a reasonable doubt* sounds a little odd.

As noted by Shapiro (1991: 29), 'by the late eighteenth century the concepts of moral certainty and reasonable doubt were tightly linked in philosophical literature, in legal treatises, and in legal discussions designed to reach the educated public. Indeed, Shapiro suggests that 'moral certainty and beyond reasonable doubt were originally viewed as synonymous' (p. 274). In twentieth-century usage, however, *reasonable doubt* is not intimately linked to the jurors' personal convictions: the question is whether a 'reasonable case' can be made, not whether the jurors have any subjective 'moral certainty' as to the truth of the matter. The change in the grammatical frame, from a personal to an impersonal one, reflects this change in the understanding of *reasonable doubt*. Roughly, this change can be portrayed as follows:

(I have) a reasonable doubt (eighteenth century)
(a) I think that maybe it is not like this (i.e., roughly, I doubt it)
(b) I think that it is good to think this
(c) I can say why I think this
(d) I think that if someone can think well this someone can think the same

(there is) a reasonable doubt (twentieth /twenty-first century)
(a') I think that if someone can think well this someone can think that maybe it is not like this

(b) –
(c) I can say why I think this
(d') I think that if other people think about it for some time they can think the same
(e) I don't want to say more
(f) I don't want to say: 'I think this, I think that it is good to think this'

Thus, I am suggesting that in present-day usage *reasonable doubt* is understood along the same lines as *a reasonable assumption* or *a reasonable hypothesis* – that is, as something for which tenable reasons can be offered, not something that one feels necessarily committed to.

Fernandez-Armesto's (1998: 165) phrase 'the death of conviction' used as a characterization of our times may be somewhat hyperbolic, but the fact that the words *conviction* and *reasonable* have ceased to be combinable is noteworthy. They were certainly combinable at the time when John Locke was writing his *Reasonableness of Christianity* and when the phrase *reasonable doubt* became established in the English language. For Locke, 'reasonableness' was consistent with both tolerance ('toleration') and conviction: tolerance for other people's opinions, belief in one's own.

To recapitulate, the meaning of the word *reasonable* has changed. As a result, the meaning of the phrase *beyond reasonable doubt* has also changed, roughly speaking, from a 'belief consistent with reason and sincerely held', to a 'supposition consistent with reason and put forward as a logical possibility'; but since this phrase was continually used for over two centuries and became entrenched in Anglo-American law as well as in ordinary language, and since the older meaning of *reasonable* is no longer known to most speakers, the change has, generally speaking, gone unnoticed.

CONCLUSION

In English-speaking countries, lawyers often rely on the concepts of 'reasonable man' and 'reasonable doubt', but they are not always happy with these concepts as working tools, far from it. The title of Michael Saltman's 1991 book *The Demise of the 'Reasonable Man'* speaks for itself. Again and again, the 'reasonable man' has been pronounced dead – and again and again, he has been resurrected and pressed into service.

The 'reasonable doubt' concept has also often been a cause for complaints. To illustrate this point, I will quote at some length a recent article from the Australian *Law Society Journal* entitled 'Being reasonable on doubt'. In this article, Daraius Shroff (2001: 68) writes:

> It is time that 'the time-honoured standard' of criminal onus of proving a case 'beyond reasonable doubt' be placed under scrutiny. In legal

> practice, the standard has been formulated as an axiom which in its terms is self-evident and not given to elucidation and analysis.
> It seems strange that if the words are so self-evident, that they not be subject of direction as juries are all too often confounded by the standard and seek in vain for guidance from the bench.

The confusion about which the author complains involves, *inter alia*, the relationship between the words *reasonable* and *rational*.

> To put the standard at its most elemental aspect, what does the word 'beyond' signify, other than to take the concept further than that circumscribed by the word 'reasonable'? The word 'reasonable' in turn derives from the faculty of being able to apply reason … and reason presupposes rationality….
> The standard bearer is the High Court decision in R v Green (1971) 126 CLR 29. The case has recently been applied in invocation of criticising a judge at first instance in Goff (2000) 112 A. Crim. R. at 491–492 where Adams J. stated that to interpret 'rational doubt' as being synonymous with 'reasonable doubt' was a significant misdirection.

Shroff concludes his attack on what he calls the 'mantra' of 'beyond reasonable doubt' by querying the relationship between *reasonable* and *reason*:

> The High Court judgment in Green went on to state that 'a reasonable doubt' which a jury may entertain is not to be confined to a 'rational doubt' or a 'doubt founded on reason' in the analytical sense or as that proposed by the trial judge. In what other sense can a deliberation be made other than 'analytical' and how absurd to suggest that 'a reasonable doubt' a jury entertains should not be a 'doubt founded upon reason'. If the doubt cannot be confined to reason (and by implication to rational application) what can it be confined to? – the intuitive, the subjective, the fantastic! It is surely a tautology to interpret language in this fashion to a point where it is devoid of meaning and reduced to absurdity.

Without wishing to enter into the legal substance matter, I would like to reiterate the point made throughout this article that meaning cannot be investigated in a precise and illuminating manner without a coherent semantic framework. In particular, the relations between *reasonable*, *reason*, and *rational* cannot be made sense of in a theoretical and methodological vacuum.

I hope that the semantic exploration of the concepts of 'reasonable man' and 'reasonable doubt' undertaken in this paper shows beyond reasonable doubt that the use of the Natural Semantic Metalanguage can help

clarify some of the most intractable and frustrating problems in legal semantics; that, moreover, it can illuminate the history and cultural underpinnings of some of the most important legal concepts; and that it can facilitate successful communication between the legal profession and lay people (whether reasonable or not).[1]

POSTSCRIPT

It is not the purpose of this paper to tackle the important practical question: how should the instructions concerning 'reasonable doubt' be formulated for the jury? Nonetheless, to illustrate the potential of the Natural Semantic Metalanguage I will briefly comment on this question.

Solan (1999) notes that the question how 'reasonable doubt' should be defined for the jury is the subject of endless debates in judicial opinions and in the scholarly literature, and he suggests that it would be more helpful to use in the jury instructions a different form of words altogether, proposing for this purpose the phrase 'firmly convinced'. He comments:

> I do not claim that the firmly convinced standard is preferable because it is a 'good' definition of proof beyond a reasonable doubt. It is not a definition in the sense that it uses simpler words to convey the meaning of a more complex concept. … The superiority of the firmly convinced instruction comes not from its semantic fidelity to the reasonable doubt standard but from its greater success in promoting important values.

I agree with Solan that the most important thing is not formulating a 'good' definition of 'proof beyond reasonable doubt', but rather 'reforming jury instructions to reflect the deeply held values that we claim to cherish' (p. 147). But why shouldn't those instructions be reformed in such a way as to 'use simpler words to convey the meaning of more complex concepts'? For my part, I would argue that the value of the instructions for the jury *depends*, to a large extent, on the simplicity of the words in which they are formulated – not only because the simpler the words the more intelligible they are, but also because the use of simple words allows one to express the intended meaning with the greatest precision. The matter needs to be further considered by the legal profession, but speaking from a linguistic point of view I would suggest that the instructions for the jury which could usefully supplement (if not replace) the 'reasonable doubt' language should rely, as far as possible, on simple and universal human concepts such as *think*, *know*, *do*, *maybe* and *because*.

To illustrate the difference between the conventional approach to definitions, which does not attempt to 'use simpler words to convey the meaning of more complex concepts', and the NSM approach let us consider two definitions of the noun *doubt*. Solan (1999:132) quotes with approval Justice Scalia's definition of this word, 'gleaned from various dic-

tionaries', which says that *doubt* is 'an uncertain, tentative, or provisional disbelief'. An NSM definition would not define the noun *doubt* in the abstract but within a sentence, along the same lines as the verb *to doubt*:

I doubt that it is like this. =
I think that maybe it is not like this
I don't know

With respect, I believe that Justice Scalia's definition ('gleaned from various dictionaries') cannot be as useful as the NSM one, first, because if someone doesn't know what *doubt* means they can hardly be expected to know what *tentative*, *provisional* or *disbelief* mean, and second, because it is highly imprecise and indeed inaccurate (*doubt* does not imply *disbelief*, whether provisional or permanent, e.g. *I doubt it* does not imply *I don't believe it*).

I submit that what applies to the definitions of words (e.g. *doubt*) applies also to instructions for jurors: if they are formulated in simple words they can be both more intelligible and more precise. To show this, I will propose below two alternative formulae which could be put to jurors instead of the 'reasonable doubt' instructions: one (A) trying to capture the spirit of Solan's own proposal, and another (B) more in line with the definition of reasonable doubt used in a recent criminal case in California (Sandoval vs. California) – a definition on which an appeal to the Supreme Court of the United States was based.

In upholding the first degree murder conviction and death sentence of petitioner Sandoval, the Supreme Court noted that the instructions given to the jurors in Sandoval's California trial 'defined reasonable doubt as, among other things, not a mere possible doubt but one depending on moral evidence, such that the jurors could not say they felt an abiding conviction … of the truth of the charge.' The Supreme Court concluded that 'the instructions in question correctly conveyed the concept of reasonable doubt'.

I suggest that whether the instructions for the jurors are formulated in terms of 'firm conviction' (as proposed by Solan) or in terms of 'an abiding conviction of the truth of the charge' (as stipulated by the Supreme Court in the Sandoval case) or, indeed, in any other relatively complex terms, it would be helpful to at least supplement them with formulae like A or B below (as formulae which the jurors could be asked to either endorse or reject):

Option A ('firmly convinced')
I think that this person did it
I know why I think this
I have thought about it for a long time
because of this, I can't think any longer:
'maybe this person didn't do it'

Option B ('abiding certainty of the truth of the charge')
someone says that this person (X) did something bad (Y)
I think that it is true
I have thought about it for a long time
during this time, I wanted to think about it like this:
'maybe this is not true'
I can't think about it like this now

I am not suggesting that either A or B constitutes necessarily the optimal form of words to be submitted to the jurors. Rather, I am suggesting that the language in which both these formulae are phrased constitutes the optimal metalanguage in which clear and intelligible instructions could be phrased. When a formula phrased in this metalanguage is found wanting from a legal point of view, its inadequacies can be clearly identified, and an improved formula can be devised – in the same simple and universal 'natural semantic metalanguage'.

NOTE

For earlier applications of the Natural Semantic Metalanguage theory to the language of law, see in particular, Goddard 1996 and Langford 1997, 2000 and 2003.

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TAB 4

CV632 Threshold.

[Name of defendant] claims that [name of plaintiff] has not met the threshold injury requirements and therefore cannot recover non-economic damages.

A person may recover non-economic damages resulting from an automobile accident only if [he] has:

[(1) permanent disability or permanent impairment based on objective findings.] or

[(2) permanent disfigurement.] or

[(3) reasonable and necessary medical expenses in excess of $3,000.]

2020 legislation added "a bone fracture" to the list.

Additionally, death and dismemberment have also long been on the list. Why are they not included in this instruction as alternatives?

References
Utah Code Section 31A-22-309(1)(a).

Committee Notes
Neither the statute nor case law has provided clear boundaries on the definitions of disability and impairment. It is also undecided whether the plaintiff or the defendant who asserts the defense carries the burden of proof or burden of moving forward.

Pinney v. Carrera, 2020 UT 43, ¶ 17 n.13 clarified that the plaintiff bears the burden of pleading and proving that the threshold requirements have been satisfied.

West's Utah Code Annotated
Title 31a. Insurance Code
Chapter 22. Contracts in Specific Lines
Part 3. Motor Vehicle Insurance (Refs & Annos)

U.C.A. 1953 § 31A-22-309

§ 31A-22-309. Limitations, exclusions, and conditions to personal injury protection

Effective: January 1, 2021
Currentness

(1)(a) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

(i) death;

(ii) dismemberment;

(iii) permanent disability or permanent impairment based upon objective findings;

(iv) permanent disfigurement;

(v) a bone fracture; or

Added in 2020 legislation.

(vi) medical expenses to a person in excess of $3,000.

(b) Subsection (1)(a) does not apply to a person making an uninsured motorist claim.

(2)(a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured or a resident family member of the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;

(iii) to any injured person, if the person's conduct contributed to the person's injury:

(A) by intentionally causing injury to the person; or

(B) while committing a felony;

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or

(vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.

(b) This Subsection (2) does not limit the exclusions that may be contained in other types of coverage.

(3) The benefits payable to any injured person under Section 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because that person is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5)(a) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred.

(b) Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer.

(c) If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1-1/2% per month after the due date.

(d) The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(6)(a) Except as provided in Subsection (6)(b), every policy providing personal injury protection coverage is subject to the following:

(i) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(ii) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

(b) There shall be no right of reimbursement between insurers under Subsection (6)(a) if the insurer of the person who would be held legally liable for the personal injuries sustained has tendered its policy limit.

(c)(i) If the insurer of the person who would be held legally liable for the personal injuries sustained reimburses a no-fault insurer prior to settling a third party liability claim with an injured person and subsequently determines that some or all of the reimbursed amount is needed to settle a third party claim, the insurer of the person who would be held legally liable for the personal injuries sustained shall provide written notice to the no-fault insurer that some or all of the reimbursed amount is needed to settle a third party liability claim.

(ii) The written notice described under Subsection (6)(c)(i) shall:

(A) identify the amount of the reimbursement that is needed to settle a third party liability claim;

(B) provide notice to the no-fault insurer that the no-fault insurer has 15 days to return the amount described in Subsection (6)(c)(ii)(A); and

(C) identify the third party liability insurer that the returned amount shall be paid to.

(iii) A no-fault insurer that receives a notice under this Subsection (6)(c) shall return the portion of the reimbursement identified under Subsection (6)(c)(ii) to the third party liability insurer identified under Subsection (6)(c)(ii)(C) within 15 business days from receipt of a notice under this Subsection (6)(c).

Credits

Laws 1985, c. 242, § 27; Laws 1986, c. 204, § 160; Laws 1988, 2nd Sp.Sess., c. 10, § 10; Laws 1991, c. 74, § 8; Laws 1992, c. 230, § 9; Laws 1994, c. 4, § 1; Laws 2000, c. 222, § 5, eff. May 1, 2000; Laws 2001, c. 59, § 3, eff. April 30, 2001; Laws 2008, c. 162, § 1, eff. May 5, 2008; Laws 2017, c. 363, § 6, eff. Dec. 31, 2017; Laws 2020, c. 130, § 2, eff. Jan. 1, 2021.

Notes of Decisions (62)

U.C.A. 1953 § 31A-22-309, UT ST § 31A-22-309
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

469 P.3d 970
Supreme Court of Utah.

Kathleen PINNEY, Respondent,
v.
Ricardo CARRERA, Petitioner.

No. 20190117
|
Heard February 10, 2020
|
Filed July 6, 2020

Synopsis

Background: Injured motorist, whose vehicle was struck by vehicle that ran a stop sign, brought personal injury action against driver of the other vehicle. The Third District Court, Salt Lake Department, Paige Petersen, J., 2017 WL 11351329, denied defendant driver's motion for judgment notwithstanding the verdict and for a new trial, and entered judgment on jury verdict in favor of motorist. Defendant appealed. The Court of Appeals, 438 P.3d 902, affirmed. Defendant filed petition for writ of certiorari, which the Supreme Court granted.

Holdings: The Supreme Court, Durrant, C.J., held that:

[1] injured motorist presented sufficient evidence to establish that she sustained permanent disability or impairment based upon objective findings, as required to maintain general damages claim;

[2] award of $300,000 in general damages was supported by the evidence;

[3] fact that specific damages award was $0 did not render general damages award improperly excessive, and thus defendant was not entitled to new trial on that ground;

[4] general damages award was not so grossly excessive and disproportionate to injuries as to be result of passion or prejudice, and thus defendant was not entitled to new trial on that ground.

Affirmed.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Judgment Notwithstanding the Verdict (JNOV); Motion for New Trial.

West Headnotes (29)

[1] Certiorari Scope and Extent in General

73 Certiorari
73II Proceedings and Determination
73k63 Review
73k64 Scope and Extent in General

73k64(1) In general

On a writ of certiorari, the Supreme Court reviews the decision of the court of appeals and applies the same standards of review used by the court of appeals.

1 Case that cites this headnote

[2] Certiorari Scope and Extent in General

73 Certiorari
73II Proceedings and Determination
73k63 Review
73k64 Scope and Extent in General
73k64(1) In general

In conducting the review on a writ of certiorari, the Supreme Court grants no deference to the court of appeals' decision.

1 Case that cites this headnote

[3] Appeal and Error Statutory or legislative law

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)2 Particular Subjects of Review in General
30k3169 Construction, Interpretation, or Application of Law
30k3173 Statutory or legislative law

Court of Appeals reviews questions of statutory interpretation for correctness.

[4] Appeal and Error Denial of new trial

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)16 Setting Aside Verdict; New Trial
30k3602 New Trial in General
30k3608 Discretion of Lower Court; Abuse of Discretion
30k3608(3) Denial of new trial

Supreme Court reviews a district court's denial of a motion for a new trial for an abuse of discretion.

[5] Automobiles "Threshold" requirement in general

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(D) Effect of No Fault Statutes
48Ak251.14 "Threshold" requirement in general

Under the statute providing that an plaintiff "may not maintain a cause of action" for general damages for personal injuries arising from an automobile accident unless the plaintiff "has sustained one or more of" five listed types of injury imposes on plaintiffs the burden of proving whether one of the five threshold injuries identified in the statute exists. Utah Code Ann. § 31A-22-309(1)(a).

[6] Automobiles "Threshold" requirement in general

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(D) Effect of No Fault Statutes
48Ak251.14 "Threshold" requirement in general

Defendants in automobile accident cases may challenge at any appropriate stage of litigation requests for general damages for personal injuries on the ground that the plaintiff cannot prove that he or she sustained one of the five statutorily identified threshold injuries. Utah Code Ann. § 31A-22-309(1)(a).

[7] **Automobiles** "Threshold" requirement in general

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(D) Effect of No Fault Statutes
48Ak251.14 "Threshold" requirement in general

Where plaintiffs fail to plead facts that, if proven, would satisfy the statute barring a plaintiff from maintaining a claim for general damages for personal injuries arising from an automobile accident unless the plaintiff suffered a threshold injury, defendants may challenge the request for general damages by bringing a motion to dismiss. Utah Code Ann. § 31A-22-309(1)(a).

[8] **Judgment** Torts

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(21) Torts

Where the facts of a case are such that there is no genuine dispute as to whether the statute allowing a plaintiff to maintain a claim for general damages for personal injuries arising from an automobile accident only if the plaintiff suffered a threshold injury is or is not satisfied, either party may bring a motion for summary judgment on the issue, but where a genuine factual dispute remains regarding whether the plaintiff has satisfied the requirements of the statute, the dispute must be decided by the fact finder at trial. Utah R. Civ. P. 56(a).

[9] **Statutes** Purpose and intent

361 Statutes
361III Construction
361III(A) In General
361k1074 Purpose
361k1076 Purpose and intent

When interpreting a statute, the Supreme Court's primary goal is to evince the true intent and purpose of the legislature.

[10] **Statutes** Language and intent, will, purpose, or policy

Statutes Plain Language; Plain, Ordinary, or Common Meaning

361 Statutes
361III Construction
361III(A) In General
361k1078 Language
361k1080 Language and intent, will, purpose, or policy

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1091 In general
In interpreting a statute, the best evidence of the legislature's intent is the plain language of the statute itself.

[11] **Statutes** Plain language; plain, ordinary, common, or literal meaning

361 Statutes
361III Construction
361III(M) Presumptions and Inferences as to Construction
361k1366 Language
361k1368 Plain language; plain, ordinary, common, or literal meaning
In considering the language of a statute, the Supreme Court assumes, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning.

[12] **Statutes** Superfluousness

361 Statutes
361III Construction
361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another
361k1156 Superfluousness
Supreme Court avoids interpretations of a statute that will render portions of the statute superfluous or inoperative.

[13] **Automobiles** Evidence and fact questions; instructions

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(D) Effect of No Fault Statutes
48Ak251.19 Evidence and fact questions; instructions
Phrase "objective findings," within meaning of statute barring a plaintiff from maintaining a claim for general damages for personal injuries arising from an automobile accident unless the plaintiff has sustained a threshold injury, including "permanent disability or permanent impairment based upon objective findings," required that a finding of a permanent disability or impairment must be based on externally verifiable phenomena, rather than on an individual's subjective perceptions, feelings, or intentions regarding the injury. Utah Code Ann. § 31A-22-309(1)(a)(iii).

[14] **Automobiles** Evidence and fact questions; instructions

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(D) Effect of No Fault Statutes
48Ak251.19 Evidence and fact questions; instructions
Plaintiffs seeking general damages for personal injuries arising from an automobile accident based on a permanent disability of permanent impairment cannot satisfy the statutory requirement that they establish such disability or impairment "based upon objective findings," merely by testifying that they believe they are permanently disabled or impaired; instead, plaintiffs must provide externally verifiable evidence of a permanent disability or impairment. Utah Code Ann. § 31A-22-309(1)(a)(iii).

[15] **Automobiles** Evidence and fact questions; instructions

Evidence Causation

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(D) Effect of No Fault Statutes
48Ak251.19 Evidence and fact questions; instructions
157 Evidence
157XX Weight and Sufficiency
157XX(H) Expert Evidence
157k3054 Weight and Sufficiency as to Particular Subjects of Expert Evidence
157k3061 Causation
(Formerly 157k571(9))

Injured motorist presented sufficient evidence to establish that she sustained "permanent disability or permanent impairment based upon objective findings," as required to maintain a claim for general damages for personal injuries arising from automobile accident against driver who ran stop sign and struck her vehicle, where motorist's chiropractor testified that driver's crash into motorist's vehicle caused her to sustain permanent herniated disc in her back, that the herniated disc constituted a permanent injury, that scar tissue in motorist's neck from crash-related injuries inhibited motorist's range of motion, that treatment failed to restore range of motion back to 100%, that scar tissue was permanent, and that his conclusions were based on multiple x-rays, MRI, and medical examinations. Utah Code Ann. § 31A-22-309(1)(a)(iii).

[16] **Damages** Disc injuries

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.32 Back and Spinal Injuries in General
115k127.35 Disc injuries

Award of $300,000 in general damages to injured motorist, who suffered herniated disc in back and scar tissue in neck resulting from injuries sustained in automobile accident in which driver ran stop sign and struck her vehicle, was supported by evidence that motorist was unable to do some of the things she used to be able to do, including riding certain amusement park rides and picking up small children, and that motorist's injuries were permanent.

[17] **Damages** Questions for Jury

115 Damages
115X Proceedings for Assessment
115k208 Questions for Jury
115k208(1) In general

Juries are generally allowed wide discretion in the assessment of damages.

[18] **Appeal and Error** Damages in General

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)20 Monetary Relief
30k3672 Damages in General
30k3673 In general

Under the Supreme Court's abuse of discretion standard of review, the Supreme Court will reverse a jury's damage award only if there is no reasonable basis for the decision.

1 Case that cites this headnote

[19] **Damages** Disc injuries

New Trial Excessive damages in general

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.32 Back and Spinal Injuries in General
115k127.35 Disc injuries
275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k77 Mistake, Passion, or Prejudice of Jurors
275k77(2) Excessive damages in general

Fact that amount of specific damages awarded to injured motorist was $0 did not render general damages award of $300,000 improperly excessive, in injured motorist's action against driver who ran stop sign and struck her vehicle, resulting in herniated disc in her back, and thus driver was not entitled to new trial on ground that damages award was so excessive as to appear to have been given under the influence of passion or prejudice; general damages award was not required to be proportional to specific damages award. Utah R. Civ. P. 59(a)(5).

[20] **New Trial** Excessive damages in general

New Trial Inadequate damages

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k77 Mistake, Passion, or Prejudice of Jurors
275k77(2) Excessive damages in general
275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k77 Mistake, Passion, or Prejudice of Jurors
275k77(4) Inadequate damages

To succeed on a request for a new trial on the ground that a damages award was improperly excessive or inadequate, a party must show, first, that a damage award is excessive or inadequate and, second, that the excessiveness or inadequacy of the award appears to have stemmed from passion or prejudice. Utah R. Civ. P. 59(a)(5).

[21] **Damages** Pecuniary Losses

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k36 In general

“Specific damages” measure harm that is considered more finite, measurable, and economic because it is more easily calculated in specific dollar amounts.

1 Case that cites this headnote

[22] **Damages** Pecuniary Losses

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k35 Pecuniary Losses
115k36 In general

"Specific damages," or "economic damages," are hard amounts that are subject to careful calculation such as the cost of medical and other necessary care or a decrease in earning ability.

2 Cases that cite this headnote

[23] **Damages** Physical suffering and inconvenience in general

115 Damages
115VI Measure of Damages
115VI(A) Injuries to the Person
115k97 Physical suffering and inconvenience in general

"General damages," which are sometimes referred to as "pain and suffering" or "noneconomic damages," measure the amount needed to compensate an individual for a diminished capacity for the enjoyment of life.

2 Cases that cite this headnote

[24] **Damages** General and special damage

115 Damages
115I Nature and Grounds in General
115k5 General and special damage

"General damages" attempt to measure the difference between what life would have been like without the harm done and what it is like as a result of the harm.

1 Case that cites this headnote

[25] **Damages** Mode of estimating damages in general

Damages Mode of estimating damages in general

Damages Mode of estimating damages in general

115 Damages
115VI Measure of Damages
115VI(A) Injuries to the Person
115k95 Mode of estimating damages in general
115 Damages
115VI Measure of Damages
115VI(B) Injuries to Property
115k103 Mode of estimating damages in general
115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k117 Mode of estimating damages in general

Because specific and general damages are aimed at measuring different types of harm, the fact finder need not consider the same factors in calculating an appropriate amount for each type of award.

[26] **Damages** Mode of estimating damages in general

Damages Mode of estimating damages in general

Damages Mode of estimating damages in general

115 Damages
115VI Measure of Damages
115VI(A) Injuries to the Person
115k95 Mode of estimating damages in general
115 Damages
115VI Measure of Damages
115VI(B) Injuries to Property
115k103 Mode of estimating damages in general
115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k117 Mode of estimating damages in general

Specific damages are calculated based on the amount of money that will fairly and adequately compensate the plaintiff for measurable losses of money or property caused by the defendant's fault.

[27] **Appeal and Error** General or special damages in general

Damages Excessive damages in general

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)20 Monetary Relief
30k3687 Particular Cases and Items
30k3689 General or special damages in general
115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.9 Excessive damages in general

Even though an award of general damages may be improperly excessive where the amount awarded is grossly disproportionate to the harm suffered (based on relevant general-damage factors), the Supreme Court will not overturn a general damages award on the ground that the plaintiff presented no evidence of economic harm.

[28] **Damages** Disc injuries

Damages Burns, scars, and skin injuries

New Trial Excessive damages in general

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.32 Back and Spinal Injuries in General
115k127.35 Disc injuries
115 Damages

115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.43 Burns, scars, and skin injuries
275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k77 Mistake, Passion, or Prejudice of Jurors
275k77(2) Excessive damages in general

General damages award of $300,000, or approximately $35 per day until injured motorist turned 80 years old, was not so grossly excessive and disproportionate to her injuries relating to herniated disc in back and scar tissue in neck as to appear to have been given under the influence of passion or prejudice, and thus driver who struck motorist's vehicle when he ran stop sign was not entitled to new trial on that ground; motorist presented ample evidence that her injuries had diminished her ability to do certain things, including riding amusement park rides and picking up small children, and that her injuries were permanent, and based on the pain and suffering from those injuries, motorist sought compensation of $50 to $75 dollars per day, for an amount between $419,000 and $630,000. Utah R. Civ. P. 59(a)(5).

[29] Damages Amount Awarded

115 Damages
115VII Amount Awarded
115VII(A) In General
115k127.1 In general

The amount of damages requested by the plaintiff does not provide a reliable standard upon which to measure the reasonableness of a jury award.

***973** Third District, Salt Lake, The Honorable Paige Petersen, No. 150900750

Attorneys and Law Firms

Blake W. Johnson, Orem, for respondent

Barbara K. Berrett, Matthew H. Wood, Salt Lake City, for petitioner

Chief Justice Durrant authored the opinion of the Court, in which Associate Chief Justice Lee, Justice Himonas, Justice Pearce, and Judge Pullan joined.

On Certiorari to the Utah Court of Appeals

Chief Justice Durrant, opinion of the Court:

***974 Introduction**

¶1 In this automobile accident case, defendant Ricardo Carrera raises two challenges to a general-damages award granted to plaintiff Kathleen Pinney. First, Mr. Carrera argues that Ms. Pinney should not have received any general damages, because she failed to satisfy the requirements set out in Utah Code section 31A-22-309, a prerequisite to receiving general damages in most automobile accident cases. Specifically, Mr. Carrera argues that Ms. Pinney failed to satisfy the statutory requirement because she did not show that she sustained a "permanent disability or permanent impairment *based upon objective findings*." [1]

[1] UTAH CODE § 31A-22-309(1)(a) (emphasis added).

¶2 Although Mr. Carrera concedes that Ms. Pinney presented evidence of a permanent impairment, he argues that this evidence does not satisfy the statute, because it was tainted by the personal bias of Ms. Pinney's treating physician. So Mr. Carrera interprets the statutory phrase "based upon objective findings" to require findings that are untainted by bias. We disagree. Instead, we interpret the phrase "based upon objective findings" to require only that findings regarding a permanent disability or impairment be based on externally verifiable phenomena, rather than on an individual's subjective perceptions or feelings regarding the injury. Accordingly, Mr. Carrera's statutory argument fails.

¶3 Alternatively, Mr. Carrera argues, under Rule 59 of the Utah Rules of Civil Procedure, that a new trial on the amount of damages should be granted. The crux of Mr. Carrera's argument on this point is that the amount of *general*, or noneconomic, damages Ms. Pinney was awarded—$300,000—is excessively disproportionate to the economic damages awarded in this case—$0. In making this argument, Mr. Carrera does not attempt to rebut any of the evidence Ms. Pinney presented regarding her pain and suffering—evidence relevant to an award of general damages. Instead, he focuses on Ms. Pinney's failure to present evidence that would support an award of *specific* damages. But because specific and general damages are aimed at measuring different types of harm, the fact finder is free to consider different factors in calculating an appropriate amount for each type of award. So there is no reason why the amount of one type of damage award would need to be proportional to the other. Accordingly, Mr. Carrera's proportionality argument also fails.

Background

¶4 After running a stop sign, Ricardo Carrera crashed into a vehicle driven by Kathleen Pinney. Ms. Pinney brought a civil action against Mr. Carrera for damages. At trial, Ms. Pinney focused on non-economic (or general) damages that resulted from the accident. Specifically, she argued that she should be compensated for pain and suffering stemming from an injury to her neck and a herniated disc in her back.

¶5 To support her claim for pain-and-suffering damages, Ms. Pinney called several witnesses to testify on her behalf. Her daughter and friend testified that her injuries limited her ability to perform many tasks she had regularly performed before the accident. For example, Ms. Pinney's daughter testified that Ms. Pinney could not ride certain amusement park rides and struggled to pick up small children. And Ms. Pinney's friend, with whom Ms. Pinney had lived for sixteen months following the accident, testified generally about the negative effect the injuries had on Ms. Pinney's life.

¶6 Additionally, Ms. Pinney called Dr. Dan George, her chiropractor, to testify regarding the nature of her injuries. Dr. George testified that the accident caused Ms. Pinney to sustain a herniated disc in her back. And he specifically testified that the herniated disc constituted "a permanent injury." He also testified that scar tissue in her neck, which stemmed from injuries sustained in the accident, inhibited Ms. Pinney's range of motion, and that treatment failed to restore her range of motion back to "100 percent." And he testified that "the scar tissue is permanent." ***975** Importantly, all of his conclusions were based on multiple x-rays and an MRI of Ms. Pinney's injuries, as well as on his medical examinations of her during the course of her treatment. Based on this evidence, Ms. Pinney requested the jury award her general damages equal to $50 or $75 per day until she turned eighty. This amounted to a request ranging from approximately $419,000 to $630,000.

¶7 After considering the evidence presented by both parties, the jury awarded Ms. Pinney $300,000 in general damages. In response, Mr. Carrera filed a post-trial motion for judgment notwithstanding the verdict. In his motion, he argued that Ms. Pinney was barred from receiving general damages because she failed to satisfy the requirement set forth in Utah Code section 31A-22-309(1)(a). This statute bars an award of general damages where a plaintiff has not sustained one of five types of injury identified in the statute. [2] In this case, the only injury type at issue is a "permanent disability or permanent impairment based

upon objective findings."[3] Citing this statute, Mr. Carrera argued that Ms. Pinney failed to demonstrate "objective findings" of a permanent injury.

2 The Utah Legislature recently amended this statute to include a sixth type of injury—"a bone fracture." This change does not take effect until January 1, 2021.

3 UTAH CODE § 31A-22-309(1)(a)(iii).

¶8 Mr. Carrera based his argument on statements Dr. George had made during cross-examination. During cross-examination, Dr. George stated that he had not issued Ms. Pinney a "permanent impairment rating." He explained that he no longer issued impairment ratings to his patients because impairment ratings "tend to hold more clout if another physician"—"one [who] hasn't worked with [the patient]"—"does them."[4] Because Dr. George testified that he did not issue Ms. Pinney a permanent impairment rating, Mr. Carrera argued that Ms. Pinney had failed to provide "objective findings" of a permanent injury.

4 We note that on re-direct examination, Dr. George explained that a "permanent impairment rating" is needed only where a patient intends to apply for governmental benefits.

¶9 The district court denied this motion. It concluded that the statute does not contain a "specific requirement that there be a permanent disability rating or a permanent impairment rating." And it concluded that Dr. George's testimony regarding the nature of Ms. Pinney's injuries was "sufficient to be an objective finding of a permanent injury." The court of appeals affirmed this ruling, holding that the term "objective findings" requires only that a plaintiff demonstrate a permanent disability or impairment "through evidence other than the plaintiff's own subjective testimony."[5]

5 *Pinney v. Carrera*, 2019 UT App 12, ¶ 27, 438 P.3d 902.

¶10 Before the district court, Mr. Carrera also brought a motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure. Specifically, he argued that the court should order a new trial on the amount of damages because (1) the damage award was not supported by the evidence on record and (2) the damage award amount was so excessive that it appeared to have been given under the influence of passion or prejudice.

¶11 The district court also denied this motion, explaining that the "amount of the award was supported by the evidence presented at trial in the form of Dr. George's testimony, the MRI showing permanent injuries, and testimony related to [Ms. Pinney's] limitations, pain, and effect on her life." And the court explained that the award was not so excessive that it appeared to have been given under the influence of passion or prejudice, because of the ample evidence regarding Ms. Pinney's pain and suffering and because the jury "did not provide the full amount" that Ms. Pinney had requested.

¶12 The court of appeals affirmed. It held that evidence on the record "gave the jury a reasonable basis upon which to rely when it awarded damages."[6] And in so doing, it noted the district court's finding that Ms. Pinney's ***976** counsel requested a damage award much greater than what the jury awarded.[7]

6 *Id.* ¶ 36.

7 *Id.* ¶ 35.

¶13 Mr. Carrera filed a petition for a writ of certiorari regarding the court of appeals' interpretation of the term "objective findings" as it is used in Utah Code section 31A-22-309 and its holding related to Mr. Carrera's motion for a new trial. We granted the petition on both issues. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(a).

Standards of Review

[1] [2] [3] [4] ¶14 "On a writ of certiorari, we review the decision of the court of appeals ... and apply the same standard[s] of review used by the court of appeals." [8] In conducting this review, we grant no deference to the court of appeals' decision. [9] Mr. Carrera asks us to review two aspects of the court of appeals' decision. First he asks us to review the court of appeals' interpretation of a statute. "We review questions of statutory interpretation for correctness." [10] Second, he asks us to review the court of appeals' affirmance of the district court's denial of his motion for a new trial. We review a district court's denial of a motion for a new trial for an abuse of discretion. [11]

8 *State v. Wilder*, 2018 UT 17, ¶ 15, 420 P.3d 1064 (second alteration in original).

9 *Id.*

10 *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 12, 267 P.3d 863.

11 *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991).

Analysis

¶15 Mr. Carrera raises two issues regarding the court of appeals' decision. First, he argues that it erred in interpreting the term "objective findings" as it appears in Utah Code section 31A-22-309(1)(a)(iii). The court of appeals interpreted "objective findings" to mean findings that are "based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." [12] Mr. Carrera, on the other hand, argues that "objective findings" means findings that are not tainted by an individual's bias. Although the term "objective" is commonly used in either sense, we conclude that, in the context of section 31A-22-309(1)(a), Mr. Carrera's proposed interpretation is unworkable. So we affirm the court of appeals on this point.

12 *Pinney v. Carrera*, 2019 UT App 12, ¶ 26, 438 P.3d 902 (quoting *Objective*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

¶16 Second, Mr. Carrera argues that the court of appeals erred in affirming the district court's denial of his new trial motion. We affirm the court of appeals on this point because, after considering the evidence on record, we conclude the district court did not abuse its discretion in denying Mr. Carrera's motion.

I. The Court of Appeals Did Not Err in Interpreting the Phrase "Objective Findings"

[5] [6] [7] [8] ¶17 Under Utah law most motor vehicle owners "may not maintain a cause of action for general damages" arising out of injuries sustained in an automobile accident unless that person "has sustained one or more of the following: (i) death; (ii) dismemberment; (iii) permanent disability or permanent impairment based upon *objective findings*; (iv) permanent disfigurement; or (v) medical expenses to a person in excess of $3,000." [13] Mr. Carrera argues that, under ***977** this statute, Ms. Pinney is not entitled to general damages, because she has failed to prove that she sustained any of the five injuries identified in the statute. We disagree and, in so doing, affirm the decisions of the district court and the court of appeals.

13 UTAH CODE § 31A-22-309(1)(a) (emphasis added). The court of appeals interpreted the phrase "may not maintain a cause of action" as imposing on plaintiffs the burden of proving whether one of the five threshold injuries identified in the statute exists. *Pinney v. Carrera*, 2019 UT App 12, ¶ 16, 438 P.3d 902. We agree. As it is used in the statute, the

plain meaning of the phrase "may not maintain" suggests that a plaintiff's cause of action fails where the plaintiff cannot prove that he or she sustained one of the five identified injuries. *See Maintain*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1998) ("[T]o sustain against opposition or danger: uphold and defend [a position]."); *Maintain*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To continue (something).... To assert (a position or opinion); to uphold (a position or opinion) in argument."). Accordingly, defendants in automobile accident cases may challenge requests for general damages on this ground at any appropriate stage of litigation. For example, where plaintiffs fail to plead facts that, if proven, would satisfy this statute, defendants may challenge the request for general damages by bringing a motion to dismiss. And where the facts of the case are such that there is "no genuine dispute" as to whether the statute is or is not satisfied, either party may bring a motion for summary judgment on the issue. *See* UTAH R. CIV. P. 56(a). But where a genuine factual dispute remains regarding whether the plaintiff has satisfied the requirements of this statute, the dispute must be decided by the fact finder at trial.

¶18 The district court and the court of appeals correctly concluded that Ms. Pinney satisfied the statute's requirements by demonstrating, through "objective findings," that she suffered a permanent impairment. The district court determined that Ms. Pinney satisfied the requirements of the statute because she had provided "objective findings" of a permanent injury through the testimony of her treating physician, Dr. George. The court of appeals affirmed.

¶19 In reviewing the decision of the district court, the court of appeals interpreted several terms contained in the statute. First, it relied on one of our earlier cases to conclude that a disability or impairment is "permanent" "whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." [14] Then it interpreted the term "disability" to mean "the inability to work" and the term "impairment" to mean "the loss of bodily function." [15] Finally, the court interpreted the phrase "objective finding." [16]

14 *Pinney*, 2019 UT App 12, ¶ 24, 438 P.3d 902 (quoting *Ralston v. Metropolitan. Life Ins. Co.*, 90 Utah 496, 62 P.2d 1119, 1123 (1936)).

15 *Id.* ¶ 25.

16 *Id.* ¶¶ 26–27.

¶20 The court of appeals interpreted the phrase "objective findings" in two steps. First, it cited Black's Law Dictionary, which defines "objective" as "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." [17] And second, it cited one of its previous cases, in which it held that a plaintiff had failed to provide "objective findings" of a permanent injury where the plaintiff did not support his claim "with something more than his say so." [18] After considering these sources, the court concluded that, to be considered "objective," "a finding need only be demonstrated through evidence other than the plaintiff's own subjective testimony." [19]

17 *Id.* ¶ 26 (internal quotation marks omitted).

18 *Id.* ¶ 26 (emphasis omitted) (quoting *McNair v. Farris*, 944 P.2d 392, 395 (Utah Ct. App. 1997)).

19 *Id.* ¶ 27.

¶21 On certiorari, Mr. Carrera challenges only the court of appeals' definition of the phrase "objective findings." He asserts that, instead of the definition of "objective" relied on by the court of appeals—"[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions"—"objective" should be defined as "expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations." [20] In other words, he argues that the term "objective" should be interpreted to require *unbiased* findings of permanent disability or impairment.

20 *Objective*, THE MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/objective (last visited June 22, 2020).

[9] [10] [11] [12] ¶22 When interpreting a statute, "our primary goal is to evince the true intent and purpose of the [l]egislature."[21] "The best evidence of the legislature's intent is the plain language of the statute itself."[22] In considering the language of a statute, "we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted ***978** meaning."[23] And we "avoid interpretations that will render portions of a statute superfluous or inoperative."[24] Because Mr. Carrera's interpretation of the statute would render the "permanent disability or permanent impairment" subsection inoperative, we reject it.

21 *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (internal quotation marks omitted).

22 *Id.* (citation omitted) (internal quotation marks omitted).

23 *Id.*

24 *Grappendorf v. Pleasant Grove City*, 2007 UT 84, ¶ 9, 173 P.3d 166 (internal quotation marks omitted).

¶23 As we have explained, Mr. Carrera argues that the term "objective" should be interpreted to require unbiased findings of a permanent disability or impairment. And he argues that, because a *treating* physician's relationship with a plaintiff creates an "inherent potential for bias," the statute requires a plaintiff to show the existence of a permanent disability or impairment "through an *independent*" medical provider. But interpreting the term "objective" in this way would render the statutory provision at issue inoperative.

¶24 The statute imposes a burden on the plaintiff to prove that one of the circumstances enumerated in the statute exists.[25] But, under Mr. Carrera's interpretation of "objective," a plaintiff could never prove the existence of a permanent disability or impairment.

25 *See supra* ¶ 17 n.13.

¶25 For example, although Mr. Carrera suggests that his reading of the statutory requirement could be satisfied by the testimony of a non-treating physician, he fails to explain how a non-treating physician retained and paid by the plaintiff would satisfy his proposed "lack of bias" requirement. As Ms. Pinney points out in her brief, "even a non-treating physician is subject to bias, prejudice, and personal feelings, especially so when one of the parties is paying financial compensation to the physician." In other words, if it is true that the "inherent potential for bias" stemming from a *treating* physician's relationship with a plaintiff would disqualify the treating physician, then the financial relationship between a plaintiff and the non-treating physician the plaintiff retained for the purposes of litigation would also preclude the *non-treating* physician. So, in order to satisfy the requirements of the statute, as Mr. Carrera interprets it, a plaintiff would need to present a physician who would be willing to testify on the plaintiff's behalf without being compensated and without otherwise being biased in the plaintiff's favor. The practical result of Mr. Carrera's proposed interpretation would be to render the statute's requirements impossible to satisfy in the absence of a court-appointed expert or a stipulation. Thus plaintiffs, on their own, could never satisfy their burden of proof. Because this would render the "permanent disability or permanent impairment" subsection inoperative, we decline to read the term "objective findings" to require findings made by a wholly independent and unbiased witness.

¶26 Alternatively, Mr. Carrera argues that even were we to decline to interpret the term "objective" as requiring testimony from an unbiased, medical expert, we should nevertheless require all medical experts to be "self-reportedly objective." In other words, he argues that even if the term "objective" does not require findings wholly free from bias, we should nevertheless interpret the statute as precluding a plaintiff from relying on any expert who openly acknowledges the potential for bias. But

we reject this alternative interpretation because, having rejected Mr. Carrera's argument that the term "objective" should be defined as "unbiased," we see nothing in the plain language of the statute that would invalidate the testimony of a physician who acknowledges the potential for bias in his or her findings.

[13] **[14]** **[15]** ¶27 Accordingly, we affirm the definition of "objective findings" adopted by the court of appeals. Under this definition, a finding of a permanent disability or impairment must be based on externally verifiable phenomena rather than on an individual's perceptions, feelings, or intentions.[26] This ***979** means plaintiffs cannot satisfy the statutory requirement merely by testifying that they believe they are permanently disabled or impaired. Instead, plaintiffs must provide externally verifiable evidence of a permanent disability or impairment. We conclude that the evidence provided by Ms. Pinney satisfies this requirement.

26 We note that our interpretation of the term "objective findings" is consistent with the meaning provided in other Utah statutes. *See*, *e.g*, UTAH CODE § 58-40a-102(1) (referring to "objective findings" in a context that strongly suggests the term "objective" refers to "verifiable" findings rather than "unbiased" ones). It is also consistent with the definition adopted for the term by other states. *See* OKLA. STAT. tit. 85A, § 2(31)(a)(3)(a) (explaining that "Objective findings" "may be established by medically recognized and accepted clinical diagnostic methodologies"); OR. REV. STAT. § 656.005(19) (defining "Objective findings" as "verifiable indications of injury or disease"); *State v. Reynolds*, 118 Conn.App. 278, 983 A.2d 874, 882–83 (2009) (discussing a distinction "in medical terminology, between objective findings, which are based on the observations of a medical provider, and subjective findings, which are based on the information provided to a medical provider by a patient"); *Felipe v. Dep't of Labor & Indus.*, 195 Wash.App. 908, 381 P.3d 205, 208–09 (2016) ("Objective findings of disability are those that can be seen, felt, or measured by a physician. Subjective findings are those based on the patient's report to the physician about symptoms perceived only by the senses and feelings of the patient." (footnotes omitted)).

¶28 Dr. George, Ms. Pinney's chiropractor, testified that Mr. Carrera's crash into Ms. Pinney's vehicle caused her to sustain a permanent herniated disc in her back. And he specifically testified that the herniated disc constituted "a permanent injury." He also testified that scar tissue, stemming from injuries sustained in the crash, inhibited Ms. Pinney's range of motion, and that treatment failed to restore her range of motion back to "100 percent." He further testified that "the scar tissue is permanent." And, importantly, he explained that all of his conclusions were based on multiple x-rays and an MRI of Ms. Pinney's injuries, as well as on his medical examinations of her during the course of her treatment. This testimony constitutes externally verifiable evidence that Ms. Pinney sustained a permanent disability or impairment. So the statute does not preclude Ms. Pinney's general damage award.

¶29 In sum, we interpret the phrase "objective findings" to require findings regarding a permanent disability or impairment to be based on externally verifiable phenomena rather than on an individual's subjective perceptions or feelings regarding the injury. Because Dr. George's testimony satisfies the "objective findings" requirement in the statute, the statute does not preclude an award of general damages in this case. Accordingly, we affirm the court of appeals on this point.

II. The Court of Appeals Did Not Err in Affirming Ms. Pinney's Damage Award

¶30 We also affirm the court of appeals' decision regarding Mr. Carrera's motion for a new trial. Mr. Carrera argues that the court of appeals erred in affirming the district court's denial of his new trial motion because (1) the damage award was not supported by the evidence on record and (2) the damage award amount was so excessive that it appeared to have been given under the influence of passion or prejudice. We disagree. The court of appeals correctly concluded that the district court did not abuse its discretion on either point.[27]

27 *See* *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991) (explaining that a district court's denial of a motion for a new trial is reviewed for an abuse of discretion).

A. The damage award was supported by sufficient evidence

[16] **[17]** **[18]** ¶31 First, the court of appeals correctly concluded that the damage award was supported by sufficient evidence. Under Rule 59(a)(6) of the Utah Rules of Civil Procedure, "a new trial may be granted" where there is an "insufficiency of the evidence to justify the verdict." Mr. Carrera argues that there is insufficient evidence to support the jury's damage award. But juries are "generally allowed wide discretion in the assessment of damages."[28] So, under our abuse of discretion standard of review, we will reverse a jury's damage award "only if there is no reasonable basis for the decision."[29]

28 *USA Power, LLC v. PacifiCorp*, 2016 UT 20, ¶ 71, 372 P.3d 629.

29 *Id.* (internal quotation marks omitted).

¶32 We conclude that there is a reasonable basis for the jury's damage award. The court ***980** of appeals determined that (1) testimony regarding Ms. Pinney's inability to do some of the things she used to be able to do and (2) testimony regarding the permanent nature of Ms. Pinney's injury "gave the jury a reasonable basis upon which to rely when it awarded damages."[30] On certiorari, Mr. Carrera does not attempt to rebut this testimony or explain why it is insufficient. Instead, he states only that the award was insufficient "in light of the fact that [Ms. Pinney] did not present evidence of special [(or specific)] damages at trial." But the lack of evidence regarding specific damages does not negate the evidence for general damages on the record. Because the evidence regarding general damages provides a reasonable basis for the jury's general damage award, we affirm the court of appeals.

30 *Pinney v. Carrera*, 2019 UT App 12, ¶ 36, 438 P.3d 902.

B. The damage award was not so excessive as to appear to have been given under the influence of passion or prejudice

[19] **[20]** ¶33 The court of appeals also correctly concluded that the damage award was not improperly excessive. Under Rule 59(a)(5) of the Utah Rules of Civil Procedure, "a new trial *may* be granted" where there are "excessive or inadequate damages that appear to have been given under the influence of passion or prejudice."[31] So to succeed under rule 59(a)(5), a party must show, first, that a damage award is excessive or inadequate and, second, that the excessiveness or inadequacy of the award appears to have stemmed from passion or prejudice. Because Mr. Carrera fails to show that the damage award in this case was excessive, his rule 59(a)(5) argument fails.

31 Utah R. Civ. P. 59(a)(5) (emphasis added); *see also Wheat v. Denver & R.G.W.R. Co.*, 122 Utah 418, 250 P.2d 932, 935 (1952) ("[W]e must determine whether the present verdict is so grossly excessive and disproportionate to the injury that it can be said from such fact alone, as a matter of law that the verdict must have been arrived at because of passion and prejudice." (internal quotation marks omitted)).

¶34 Mr. Carrera argues that the amount of general damages awarded in this case—$300,000—is improperly excessive when viewed in proportion to the amount of specific damages awarded—$0. But this argument fails because specific damages and general damages are meant to measure different types of harm.

[21] **[22]** ¶35 Specific damages measure harm that is "considered more finite, measurable, and 'economic' because [it is] more easily calculated" in specific dollar amounts.[32] In other words, specific (or "economic") damages are " 'hard' amounts [that are] subject to careful calculation" such as the cost of "medical and other necessary care" or a decrease in "earning ability."[33]

32 *Judd v. Drezga*, 2004 UT 91, ¶ 4, 103 P.3d 135.

33 *Id.*

[23] **[24]** ¶36 In contrast, general damages, which are sometimes referred to as "pain and suffering" or "noneconomic" damages, measure the amount needed to compensate an individual for a "diminished capacity for the enjoyment of life."[34] In other words, general damages attempt to measure "the difference between what life would have been like without the harm done ... and what it is like" as a result of the harm.[35] So the type of harm for which general damages are awarded is markedly different from the type of harm underlying a specific damage award.

34 *Id.*

35 *Id.*

[25] **[26]** ¶37 Because specific and general damages are aimed at measuring different types of harm, the fact finder need not consider the same factors in calculating an appropriate amount for each type of award. For example, a typical jury instruction for general damages instructs the fact finder to consider such factors as "the nature and extent of injuries," "the extent to which [the plaintiff] has been prevented from pursuing [his or her] ordinary affairs," "the extent to which [the plaintiff] has been limited in [the] enjoyment of life," and "whether the consequences of these injuries are likely to continue, ***981** and for how long."[36] Specific damages, on the other hand, are calculated based on "the amount of money that will fairly and adequately compensate" the plaintiff for measurable losses of money or property caused by the defendant's fault.[37] Because the factors used to calculate general damage awards differ from those used to calculate specific damage awards, there is no reason why the amount of one type of damage award would need to be proportional to the other.

36 *See, e.g.*, *Pinney*, 2019 UT App 12, ¶ 8, 438 P.3d 902.

37 *Brereton v. Dixon*, 20 Utah 2d 64, 433 P.2d 3, 5 (1967).

[27] ¶38 So even though an award of general damages may be improperly excessive where the amount awarded is grossly disproportionate to the harm suffered (based on relevant general-damage factors),[38] we will not overturn a general damage award on the ground that the plaintiff presented no evidence of economic harm. Accordingly, Mr. Carrera's proportionality argument fails.

38 *See Wheat*, 250 P.2d at 935 (asking whether an award was "disproportionate to the injury").

[28] ¶39 Mr. Carrera also argues that he's entitled to a new trial on damages because the general damage award was likely given "under the influence of passion or prejudice." But there is nothing on the face of the award that would suggest that the jury acted improperly in calculating damages.

[29] ¶40 As we have explained, general damages are meant to measure "the difference between what life would have been like without the harm done ... and what it is like" as a result of the harm.[39] Ms. Pinney presented ample evidence that her injuries had diminished her ability to do certain things and that her injuries were permanent. Based on the pain and suffering stemming from these injuries, she argued that she should be compensated in an amount somewhere between $50 and $75 per day until she reached the age of eighty. But instead of awarding Ms. Pinney the full amount she requested—which would have amounted

to between $419,000 and $630,000—the jury awarded her $300,000 (or approximately $35 per day). Based on the facts of this case, the amount Ms. Pinney received is not "so grossly excessive and disproportionate" to her injury that the district court clearly erred in denying Mr. Carrera's rule 59 motion. [40]

39 *Judd*, 2004 UT 91, ¶ 4, 103 P.3d 135.

40 *Wheat*, 250 P.2d at 935. In denying Mr. Carrera's request for a new trial, the district court appeared to rely heavily on the fact that the jury awarded Ms. Pinney less than she asked for. Although we affirm the district court's decision based on the facts of this case, we note that the amount requested by the plaintiff does not provide a reliable standard upon which to measure the reasonableness of a jury award.

¶41 And this conclusion is not altered by any of the record evidence to which Mr. Carrera points. Mr. Carrera argues that Ms. Pinney "stoked the fire" of prejudice by making a number of improper comments. But Mr. Carrera did not object to any of these allegedly improper comments at trial, and we therefore do not review them for error. Instead, we consider these comments only to the extent they are relevant to our analysis under rule 59(a)(5). [41] In other words, we consider these comments only in our attempt to determine whether the damage award is so "excessive ... that [it] appear[s] to have been given under the influence of passion or prejudice." [42] And under this standard, we do not find that the allegedly improper comments warranted a new trial. Although improper statements made to a jury could help explain how a jury arrived at an extremely high damage award in some cases, we conclude—based on the amount of the award and the evidence supporting it—that the jury award does not appear to be the result of passion or prejudice. So the district court did ***982** not abuse its discretion in denying Mr. Carrera's motion for a new trial.

41 Under a rule 59(a)(5) analysis, a court may consider any evidence presented to the jury, whether it could have been excluded with a timely objection or not. But, as our resolution of the issue in this case demonstrates, where the court determines that the damage amount is reasonable, the analysis stops there. So, in a rule 59(a)(5) analysis, it is only as the amount of the award reaches unreasonable levels that a court would begin searching for potentially prejudicial evidence that could help explain the award's unreasonableness.

42 UTAH R. CIV. P. 59(a)(5).

¶42 In sum, Mr. Carrera fails to show that the damage award was unsupported by the evidence or was improperly excessive. Accordingly, we affirm the court of appeals.

Conclusion

¶43 Mr. Carrera argues that the court of appeals erred in interpreting the term "objective findings" as it appears in Utah Code section 31A-22-309(1)(a)(iii) and in affirming the district court's denial of his new trial motion. Because the court of appeals correctly interpreted the statute to require only findings that are "based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions," [43] and because the evidence on record leads us to conclude that the district court did not abuse its discretion in denying Mr. Carrera's motion, we affirm the court's decision on both points.

43 *Pinney v. Carrera*, 2019 UT App 12, ¶ 26, 438 P.3d 902 (internal quotation marks omitted).

Having recused herself, Justice Petersen does not participate herein; District Court Judge Derek P. Pullan sat.

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All Citations

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TAB 5

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2023
	Avoiding Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Approved in October 2022. Presented to Judicial Council November 2022. Discussed at December meeting. Going to Board of District Court Judges.	
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Prescriptive Easement draft to be presented at January 2023 meeting. Easement by Necessity last on agenda October 2022. Nearing completion and will report back.	Jan. 2023
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	?
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, where these completed? Marianna could only find notes as to intention to form this subcommittee.	
2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
2300	Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.	
	Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022