SCHALLER, J., with whom KATZ and VERTEFEUILLE, Js., join, dissenting. Because the jury was not instructed to determine whether the injuries suffered by Michael Rynich constituted a " '[s]erious physical injury' " as defined in General Statutes § 53a-3 (4), and because the injuries suffered, in my view, do not satisfy, as a matter of law, the statutory criteria for serious physical injury, I respectfully dissent. I begin by clarifying our role in this case and why the foundation of the majority's conclusion is based on a faulty premise. Next, I will demonstrate how, under proper consideration of the statutory criteria set forth in § 53a-3 (4), Rynich's injuries do not constitute serious physical injuries as a matter of law. Finally, I will raise some prudential considerations as to why the majority's conclusion may well have adverse consequences that extend beyond the confines of this case.

At the outset, I recognize that when a reviewing court addresses a claim challenging the sufficiency of the evidence, an inherent tension exists between the duty of the court to provide meaningful review of the jury's verdict and the admonition that the court must not attempt to "sit as a thirteenth juror." (Internal quotation marks omitted.) *State* v. *Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005). Accordingly, our role is to proceed cautiously, keeping in mind that we must construe the evidence in the light most favorable to sustaining the verdict. *State* v. *Jones*, 289 Conn. 742, 754, 961 A.2d 322 (2008). As a court of last resort, however, we are bound to define and distinguish concepts and, in effect, to *draw lines* to ensure the orderly administration of our laws. The present case calls upon us to draw a line between " '[p]hysical injury' " and " '[s]erious physical injury' " as the legislature has defined those terms in our statutes. General Statutes § 53a-3 (3) and (4). Although it may often be difficult to distinguish between the two concepts in particular factual situations, the distinction must be drawn. *State* v. *Rossier*, 175 Conn. 204, 207, 397 A.2d 110 (1978). I wish to emphasize that this inquiry is not some abstract controversy in semantics. Because the state presented *no evidence* whatsoever on the dangerousness of pepper spray, the only way in which the jury's verdict finding the defendant, Paul Ovechka, guilty of assault in the second degree can be sustained is through a series of reverse inferences that hinge upon an initial finding of a serious physical injury.[1] That is to say, if the jury had found that Rynich, in fact, had suffered serious physical injuries, then it reasonably could have inferred that the substance the defendant used was a " '[d]angerous instrument' " as defined by § 53a-3 (7)—i.e., an instrument capable of causing serious physical injuries—which is a necessary predicate to sustain a conviction

of assault in the second degree under General Statutes § 53a-60 (a) (2).[2] In contrast, a mere finding of physical injury, in and of itself, would not suffice to support an inference that the substance was a dangerous instrument, in which case, the conviction, as the majority of the Appellate Court determined, cannot stand.

Section 53a-3 (3) defines " '[p]hysical injury' " simply and broadly as "impairment of physical condition or pain . . . ." On the other hand, § 53a-3 (4) defines " '[s]erious physical injury' " as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." It is beyond dispute that these terms encompass different categories of injuries. Moreover, by explicitly defining the concepts, it is clear that the legislature intended, at the least, to minimize the potential inequities that could result if cases such as this were decided by jurors, who were employing different and widely varying constructs of what constitutes a physical injury as opposed to a serious physical injury. We, therefore, must give meaning to, rather than erode, the distinction between these two statutorily defined concepts so that two different juries, presented with the same facts, would not likely, absent the drawing of *some* line, arrive at different verdicts.

In the present case, the majority purports to uphold the jury's verdict based on the notion that the jury reasonably had found that Rynich had suffered a "serious . . . impairment of the function of any bodily organ"; General Statutes § 53a-3 (4); namely, to the eyes and skin, which are both bodily organs.[3] The flaw in the majority's rationale is that, undisputedly, the jury *never* made such a finding because the trial court never instructed the jury on the definition of serious physical injury. Rather, the trial court instructed the jury only on the definition of physical injury, which Rynich clearly suffered, given that term's low threshold and recognition of pain as a criterion. The cornerstone of the majority's rationale, therefore, is unsupportable because the jury never found—nor even had the opportunity to consider—whether Rynich's injuries constituted a "serious . . . impairment of the function of any bodily organ . . . ."[4] General Statutes § 53a-3 (4).

Accordingly, in the absence of a jury finding, I must determine whether the injuries Rynich suffered constituted serious physical injuries as a matter of law. In concluding that the state failed to present sufficient evidence for the jury to find that the defendant, in fact, had suffered serious physical injury, the majority of the Appellate Court stated that, "[a]lthough there was testimony to establish that Rynich suffered eye irritation as well [as a burning sensation on his skin], the facts show that Rynich, after being sprayed, was able to follow the defendant as well as drive himself home

at the end of the incident. The evidence proffered by the state established only that Rynich suffered physical injury, i.e., skin and eye irritation, not serious physical injury. Therefore, the jury reasonably could not have concluded that the severity of Rynich's injuries was consistent with the defendant having sprayed Rynich with a dangerous instrument." (Internal quotation marks omitted.) *State* v. *Ovechka*, 99 Conn. App. 679, 685, 915 A.2d 926 (2007). I agree.

In support of its position on appeal, the state principally relies on the testimony of Rynich and his emergency room physician, Jeffrey Pellenberg. Rynich testified that after being sprayed he was blinded and burned and that his eyes were blurry for the rest of the day. Pellenberg testified that he diagnosed Rynich with chemical conjunctivitis and chemical dermatitis, which, according to Pellenberg, means irritation of the eyes and skin.

When construed in a light most favorable to sustaining the verdict, the evidence supported only findings that Rynich suffered irritation to his eyes and skin resulting in a temporary impairment of his sight and some burning sensation on his skin. Although this was, undoubtedly, an unpleasant experience, it hardly rises to the level of seriousness embodied in § 53a-3 (4). With respect to the skin irritation, such a condition, as presented, is not an appropriate matter to be considered in a serious physical injury inquiry. The only evidence presented on this score was that Rynich felt a burning sensation. A burning sensation is not an *injury*, but rather a sensation of *pain* which, as our law clearly dictates, is not a concept embodied in § 53a-3 (4). *State* v. *Milum*, 197 Conn. 602, 619, 500 A.2d 555 (1985) (pain is not a concept embodied in statutory definition of serious physical injury).[5] Rather, it is the resulting tissue damage from a burn that constitutes the *injury* that leads to the impairment of the function of the skin, i.e., the bodily organ. In the present case, *no evidence* was presented regarding the extent of damage, if any, to Rynich's skin tissue.[6] A sensation of pain itself, in the absence of expert testimony to the contrary, is not a sufficient basis on which to conclude that the skin's function seriously has been impaired. Accordingly, the only relevant injury presented by this case is with respect to possible injury to Rynich's eyes. It is significant that, after initially being sprayed, Rynich continued to pursue the defendant on the defendant's own property. After a second spraying, Rynich pursued the defendant all the way to the defendant's front door step. Only after the third spraying and the defendant's ultimate retreat into his home, did Rynich cease his pursuit. Thereafter, Rynich was capable of driving his car to his own house. *State* v. *Ovechka*, supra, 99 Conn. App. 684. I fail to see how a person who supposedly has suffered a serious impairment of his eyes could be capable of such actions. Finally, my position finds support in the

photographs admitted into evidence depicting Rynich's condition, which show only a slight redness around Rynich's eyes and moderate redness on his skin, akin to a mild sunburn.

In cases in which our appellate courts have determined that sufficient evidence existed to support a finding of serious physical injury, the injuries suffered were, appropriately, of a *serious* nature. See, e.g., *State* v. *Miller*, 202 Conn. 463, 488, 522 A.2d 249 (1987) (strangulation leading to loss of consciousness, severe facial lacerations, multiple abrasions and contusions, swollen blood filled eyes, weeklong hospital stay); *State* v. *Robinson*, 174 Conn. 604, 606, 392 A.2d 475 (1978) (lacerations, fractured ribs, multiple bruises, broken finger, disfigured legs, blood transfusions); *State* v. *Jeustiniano*, 172 Conn. 275, 281–82, 374 A.2d 209 (1977) (gunshot wounds to groin and forearm); *State* v. *Barretta*, 82 Conn. App. 684, 690, 846 A.2d 946 (severe bruises, abrasions and contusions across trunk of body, shoulder and neckline), cert. denied, 270 Conn. 905, 853 A.2d 522 (2004); *State* v. *Aponte*, 50 Conn. App. 114, 118, 718 A.2d 36 (1998) (potentially life-threatening pancreatic injury, closure of left eye), rev'd in part on other grounds, 249 Conn. 735, 738 A.2d 117 (1999); *State* v. *Graham*, 21 Conn. App. 688, 717, 575 A.2d 1057 (gunshot wound to face and shoulder, loss of sight in left eye), cert. denied, 216 Conn. 805, 577 A.2d 1063 (1990); *State* v. *Vuley* 15 Conn. App. 586, 589, 545 A.2d 1157 (1988) (momentary loss of sight, hematoma, laceration to scalp requiring seven stitches). Despite this cohesive body of law, the majority finds inconsistency and confusion in the fact that in *State* v. *Rossier*, supra, 175 Conn. 206–208, we concluded that evidence of multiple contusions and a right ankle sprain did not constitute sufficient evidence to support a finding of serious physical injury, whereas in *State* v. *Barretta*, supra, 684, the Appellate Court concluded that extensive bruises and abrasions were sufficient to constitute serious physical injuries. I cannot agree with the majority's apparent interpretation that all bruises constitute the same degree of injury. More importantly, the majority omits from its discussion of *Barretta* the fact that the victim was beaten repeatedly with a baseball bat and kicked to the point where his entire torso was covered with blue and purple bruises and abrasions and that the victim could not walk without assistance. Id., 686, 690. Under the "disfigurement" prong of § 53a-3 (4), which is not at issue in the present case, the Appellate Court determined that these were serious physical injuries. Such injuries are a far cry from the injuries suffered by the victim in *Rossier*, who only required an ace bandage for his ankle. *State* v. *Rossier*, supra, 206.[7] In light of our precedent and the nature of the injuries suffered by Rynich, I conclude that the Appellate Court majority properly determined that there was insufficient evidence to support the defendant's conviction of assault in the second

degree in violation of § 53a-60 (a) (2).

Turning to the consequences of the majority's decision, despite the faulty premise that underlies its conclusion, the majority proceeds to set forth what, in effect, must be considered a per se rule, thereby potentially exposing *all* users of this device to a charge of assault in the second degree in violation of § 53a-60 (a) (2). This is so because, at a minimum, virtually every such "victim" of pepper spray is likely to suffer temporary visual blurriness along with eye and skin irritation. It is common knowledge that the ordinary function of pepper spray is as a nonlethal form of self-protection for ordinary citizens and as a nonlethal means by which police officers subdue an uncooperative suspect. To be sure, the use of pepper spray must not be taken lightly. With that in mind, however, I am troubled by the potential *unintended consequences* of the majority's ruling on actions undertaken by ordinary citizens.[8] Moreover, I am equally concerned about the potentially chilling effect this ruling could have on the use of pepper spray by police officers and correction officers. Will these officers be more hesitant to use pepper spray knowing that the suspect or prisoner could rely on this case to support a civil action seeking damages for serious physical injuries and the concomitant increase in civil liability for the officer and his governmental agency?

Moreover, because the majority's ruling necessarily flows from the nature of the *injury* and not the *instrument*, its opinion could well be interpreted to go beyond pepper spray cases to apply more broadly to any case involving an action that produces visual blurriness and skin and eye irritation. At this point, it is important to note that § 53a-60 (a) (2) requires an analysis of the *circumstances* in which the instrument is used. That is, if someone causes another person to suffer from blurriness while that person is driving an automobile, I would agree, as the defendant concedes, that under such circumstances, the instrument would be capable of causing serious physical injuries, i.e., injuries flowing from an automobile accident. That said, the majority's decision in this case—which clearly did not arise out of such circumstances—could lead to unintended adverse consequences under § 53a-60 (a) (2) on the ground that visual blurriness and eye and skin irritation are serious physical injuries. For the foregoing reasons, including the insufficient evidence in this case and the adverse consequences of the ruling, I respectfully dissent.

Accordingly, I would affirm the judgment of the Appellate Court.

[1] Ordinarily, the state could have proven that the pepper spray or weed killer, if used, was a dangerous instrument by offering expert testimony that such an instrument was "capable of causing death or serious physical injury . . . ." General Statutes § 53a-3 (7). In the present case, the state offered *no evidence* about the capability or characteristics of either substance. On appeal, the state argues that it is within a juror's common knowledge that these substances are capable of causing serious physical injury. I disagree. Black's Law Dictionary defines "common knowledge" as "[a] fact that is so

widely known that a court may accept it as true without proof." Black's Law Dictionary (8th Ed. 2004). Because common knowledge is limited to obvious facts, given the unlikelihood that even a statistically significant minority of our population has been exposed to pepper spray or weed killer, it is too far a stretch to assume that a juror would know whether these substances are capable of causing serious physical injury in the manner used by the defendant, if indeed such capability exists. Moreover, the majority does not rely on this facet of the state's argument as a basis for upholding its conclusion that the evidence in the present case was sufficient.

[2] Stated affirmatively, "[t]o prove the defendant guilty of assault in the second degree pursuant to § 53a-60 (a) (2), the state was required to prove beyond a reasonable doubt that the defendant, with intent to cause a physical injury to Rynich, caused such injury to Rynich by means of a dangerous instrument. General Statutes § 53a-3 (7) defines [d]angerous instrument in relevant part as any instrument . . . which, under the circumstances in which it is used . . . *is capable of causing death or serious physical injury* . . . . [Section] 53a-3 (4) defines [s]erious physical injury as physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or *serious loss or impairment of the function of any bodily organ* . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Ovechka*, 99 Conn. App. 679, 683, 915 A.2d 926 (2007).

[3] Indeed, the dissent in the Appellate Court, which the majority endorses, asserts that "[t]he jury reasonably could have found that a loss of vision in both his eyes, albeit temporarily, constituted a loss of serious impairment of the function of any bodily organ." *State* v. *Ovechka*, 99 Conn. App. 679, 689, 915 A.2d 926 (2007) (*Rogers*, *J.*, dissenting).

[4] The majority suggests that I have conflated the sufficiency claim, which is before us, with the instructional claim, which is not. See footnote 18 of the majority opinion. I raise the instructional issue to underscore why the majority's deference to the findings of the trier of fact; see footnote 13 of the majority opinion; is misplaced. I do not see how we can give deference to a finding that Rynich's injuries constituted a "serious . . . impairment of the function of any bodily organ" even though such finding undisputedly was never made because the jury was not instructed about that definition.

[5] Pain can be a proper consideration in a serious bodily injury analysis in certain circumstances. See, e.g., Federal Sentencing Guidelines Manual § 1B1.1, commentary n.1 (L) (2008) (defining " '[s]erious bodily injury' " as "injury involving *extreme physical pain* or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation" [emphasis added]); see also *United States* v. *Harris*, 44 F.3d 1206, 1216 (3d Cir.), cert. denied, 514 U.S. 1088, 115 S. Ct. 1806, 131 L. Ed. 2d 731 (1995).

[6] In its brief, the state asserts that "[s]evere irritation of the skin such as that suffered by Rynich constitutes both a painful injury to the skin and endangerment of the skin's ability to efficiently and effectively serve its bodily functions." As noted, pain is irrelevant to the issue before us, and no evidence was presented at trial regarding the bodily functions the skin performs or, more specifically, whether, and to what extent, Rynich's skin was affected in this regard.

[7] It should also be noted that, although they may be persuasive, we are not bound by decisions of the Appellate Court. Therefore, I disagree with the majority's attempt to demonstrate inconsistencies in our case law on the basis of decisions from two different courts.

In addition, I find the majority's reference to outside jurisdictions unpersuasive. Many of those cases address different substances, i.e., tear gas or Mace; see, e.g., *United States* v. *Dukovich*, 11 F.3d 140, 142 (11th Cir.) (addressing tear gas Mace), cert. denied, 511 U.S. 1111, 114 S. Ct. 2112, 128 L. Ed. 2d 671 (1994); and/or are based on different statutory criteria. See, e.g., *Commonwealth* v. *Lord*, 55 Mass. App. 265, 268–69, 770 N.E.2d 520 (statutes do not define "dangerous weapon"), review denied, 437 Mass. 1108, 774 N.E.2d 1098 (2002).

[8] Take for example a woman walking down a dark street at night, followed by an unknown man. If the woman intentionally sprays the man because she, albeit mistakenly and in good faith, believes an attack is imminent, her criminal exposure, as a result of the majority's opinion, based as it is on a faulty premise, has increased from assault in the third degree in violation of General Statutes § 53a-61 (a) (1), which is a class A *misdemeanor* with no minimum sentence, to assault in the second degree in violation of § 53a-60 (a) (2), which is a class D *felony* that carries a minimum sentence of one year imprisonment and a maximum sentence of five years imprisonment.

General Statutes § 53a-35a (8). Although I agree with the majority that our statutes provide justification defenses, the availability of these defenses does not bear on the point made, that is, that certain people may be faced with heightened *criminal exposure* as a result of the majority opinion.