SCC File No.: 39122

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)**

BETWEEN:

**THE CITY OF CORNER BROOK**

**APPELLANT**

- and –

**MARY BAILEY**

**RESPONDENT**

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# APPELLANT'S FACTUM

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## PART I – OVERVIEW & STATEMENT OF FACTS

### Overview

1. This matter concerns the interpretation of a release and indemnity agreement.

2. The agreement arose as a result of the settlement of litigation between a driver and the City of Corner Brook. The litigation concerned a motor vehicle accident. The driver accepted settlement funds and executed the agreement wherein she promised to indemnify the City for, and release the City from, all claims arising from the accident. Years later the driver sued the City again in regards to the same accident, by way of a third party claim. The City argues that the release and indemnity agreement bars the driver's third party claim.

3. The law of contractual interpretation was clearly stated by this Court in *Sattva*: we must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. While the surrounding circumstances must be considered, they must never be allowed to overwhelm the words of the contract.

4. The question before this Court is whether a release and indemnity agreement should be interpreted more narrowly than other contracts, especially when there is nothing in the factual matrix specifically indicating that a narrow interpretation was intended by the parties.

5. The Respondent argues that, regardless of what the agreement says, the subject matter of a release is always limited to those things that were "specially in the contemplation of the parties" at the time of execution (the Blackmore rule), and that this interpretation may overwhelm the words of the agreement. The Appellant argues that the Respondent's approach is outdated and no longer reflects the law of contractual interpretation in Canada. The Appellant submits that the release and indemnity agreement should be interpreted in accordance with the normal rules of contractual interpretation.

6. In keeping with those normal rules, the Court must review the context of the agreement to determine how it informs the text. In this case, the subject matter of the release and indemnity is plainly described in the agreement: all claims arising from the accident. There

is nothing in the factual matrix that could narrow this subject matter without overwhelming the words of the agreement.

7. The words of the agreement and the context reveal that the parties intended to wipe the slate clean between them. To achieve this intention, the parties negotiated a full and final release and indemnity with broad, inclusive wording. The intention was finality.

8. The Trial Judge applied the correct legal principle when he considered the context and the words of the agreement (including the broad and inclusive words such as: "as well as"; "and without limiting the generality of the foregoing"; and "including but not restricted to") in order to determine the subject matter of the agreement. The Newfoundland and Labrador Court of Appeal erred when it rendered those words meaningless. In fact, it reversed their meaning.

9. In so doing, the NL Court of Appeal took a narrow approach to contractual interpretation that departs from the jurisprudence of this Court, various provincial Courts of Appeal, and the courts of other common law jurisdictions.

10. This appeal provides an opportunity to denounce the Blackmore rule and to restate the application of the principles of contractual interpretation as they apply to releases.

**Facts**

11. This is a matter with a very limited factual matrix. Further, the facts are not in dispute.

12. The agreement before the court concerns a motor vehicle accident that occurred on March 3, 2009 when a driver collided with a City employee who was shovelling cold patch into a pothole.

13. The City employee, Mr. Temple, sued the driver in negligence for his injuries. He did not sue the City. He alleged that the driver solely caused the accident. In his Statement of Claim, Mr. Temple alleged that, among other things, the driver was driving too fast under the circumstances, she failed to keep a proper lookout, she failed to see Mr. Temple in time

to avoid hitting him, and she failed to stop, swerve, or even slow down.[1] The driver gave the Temple Statement of Claim to her insurer who told her that they would take care of it.[2]

14. Subsequently, in a separate claim, the driver sued the City in negligence, acknowledging that she struck the City employee and alleging that the City failed to adequately warn motorists of the roadwork.[3]

15. The City denied liability. At the time of the accident, Mr. Temple was standing next to a City truck, which had its emergency lights flashing. A sign was in place marking a construction zone. Mr. Temple was wearing a neon yellow safety vest with reflective tape and a hard hat with reflective tape.[4]

16. Throughout the settlement negotiations the City's counsel maintained that his client felt strongly on liability. He indicated that the City was concerned about the cost of litigating the driver's claim, and observed that even if the City applied for a summary trial to dispose of the claim, it would "only likely net party and party costs." He indicated that the City's offer to settle was premised on its liability defence, balanced with litigation risk and cost. The City's offer to settle was contingent on the execution of a "Full and Final release."[5]

17. The City knew its employee had been injured in the accident[6] but it had no knowledge of the Temple action.[7] The driver did not mention it.[8]

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[1] Statement of Claim in action number 2011 04G 0049, between David Temple, Plaintiff, and Mary Bailey, Defendant. [Tab 3, vol. 1, pp, 41-42 of the Record].

[2] Answers to Interrogatories of Mary Bailey dated February 10, 2017 [Tab 18, vol. 2, p. 53 of the Record].

[3] Statement of Claim in action number 2011 04G 0062 between Mary and Gerald Bailey, Plaintiffs, and the City of Corner Brook, Defendant [Tab 10, vol. 1, p. 97 of the Record].

[4] The Supplementary Affidavit of Dale Park at para 6 [Tab 20, vol. 2, p. 63 of the Record].

[5] The Supplementary Affidavit of Dale Park at Exhibit D [Tab 20, vol. 2, p. 86 of the Record].

[6] The Supplementary Affidavit of Dale Park at paras 3, 6 [Tab 20, vol. 2, p. 63 of the Record].

[7] The limitation period for such an action had passed pursuant to s. 5(a) of the *Limitations Act*, SNL1995 c. L-16.1 (the "*Limitations Act*").

[8] The Supplementary Affidavit of Dale Park at Exhibit D [Tab 20, vol. 2, pp. 83-167 of the Record].

18. The driver was informed by her counsel that she could expect "a quick turnaround" of settlement funds in exchange for the execution of the release.[9]

19. The City's counsel provided the driver's counsel with the release and indemnity agreement for his review. No revisions were requested.[10] This is the agreement at issue in this case.

20. The driver accepted $7,500 in settlement and signed the agreement in which she agreed to:

> *…release and forever discharge the Releasees, their servants, agents, officers, directors, managers, employees, their associated, affiliated and subsidiary legal entities and their legal successors and assigns, both jointly and severally, from all actions, suits, causes of action, debts, dues, accounts, benefits, bonds, covenants, contracts, costs, claims and demands whatsoever, including all claims for compensation, loss of use, loss of time, loss of wages, expenses, disability, past, present or future, and any aggravation, foreseen or unforeseen, as well as for injuries presently undisclosed and all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009, and without limiting the generality of the foregoing from all claims raised or which could have been raised in the action entitled 2011 04G 0062, between MARY BAILEY, as First Plaintiff, GERALD BAILEY, as Second Plaintiff, and THE CORNER BROOK CITY COUNCIL as Defendant, which was commenced in the Supreme Court of Newfoundland and Labrador, Trial Division (General) (the "Action"), including but not restricted to claims for:*
>
> - *special damages to be proven at trial, including property damages to the motor vehicle of the First Plaintiff and Second Plaintiff;*
> - *general damages to be proven at trial;*
> - *costs of this action including cost of Discoveries;*
> - *pre-judgment and post-judgment interest;*
> - *such further and other relief as this Honourable Court may deem just.*
>
> *AND for the consideration aforesaid, the Releasors on behalf of themselves and their heirs, dependents, executors, administrators, successors, assigns and both legal and personal representatives hereby covenant, agree and*

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[9] The Supplementary Affidavit of Dale Park at Exhibit D [Tab 20, vol. 2, p. 111 of the Record].

[10] The Supplementary Affidavit of Dale Park at Exhibit D [Tab 20, vol. 2, pp. 131-133 of the Record].

> *undertake to indemnify and save harmless and to keep indemnified the Releasees, their servants, agents, officers, directors, managers, employees, their associated, affiliated and legal entities and their legal successors and assigns, both jointly and severally, from any further claims, demands, actions or suits which may be brought by or on behalf of or in the name of the Releasors against the Releasees, their servants, agents, officers, directors, managers, employees, their associated, affiliated and legal entities and their legal successors, either jointly or severally, for and in respect of any of the matters or things hereinbefore set forth;*
>
> …
>
> *AND the Releasors hereby authorize and instruct their solicitors, Murphy, Watton & Burridge, to immediately discontinue the Action against the Releasees, with no order as to costs.*[11]

21. In the agreement the driver declared that she fully understood the terms of the agreement, and that she executed it with "full knowledge of any and all rights" which she might have as against the City. Further, she acknowledged that the settlement was "full and final".[12]

22. On February 10, 2017, the driver answered interrogatories sent to her by the City. In these interrogatories, the driver acknowledged that:

    (a) she read the release and indemnity agreement before signing it; and,

    (b) she read Mr. Temple's Statement of Claim before signing the release.[13]

23. Four years after signing the agreement, the driver, as the defendant in the Temple action, commenced a third party action against the City, once again alleging that the City was negligent for the accident.

24. The City moved for a summary trial to enforce the agreement and have the third party claim dismissed.

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[11] Release and indemnity agreement dated August 26, 2011. [Tab 20, vol. 2, pp. 74-77 of the Record].

[12] *Ibid.*

[13] Answers to Interrogatories of Mary Bailey dated February 10, 2017 [Tab 18, vol. 2, pp. 52, 54 of the Record].

**The Decisions Below**

25. The Trial Judge found that the driver's third party claim against the City was barred by the release.

26. The Trial Judge found, based on the factual record, that:

    (a) The City's intention was to obtain a full and final release in order to close its file;

    (b) The City did not intend to purchase a partial release. It intended to avoid the expense of further litigation;

    (c) The driver knew of Mr. Temple's action before signing the agreement;

    (d) The agreement was signed in the presence of her lawyer and with the benefit of legal advice; and,

    (e) The driver's lawyer could have negotiated to change the wording of the release. He did not.[14]

27. The Court of Appeal gave very little weight to these factual findings.

28. While the Court of Appeal agreed that the standard of review of the Trial Judge's factual findings was palpable and overriding error, it held that the Trial Judge had incorrectly applied the relevant interpretative principles, thereby committing an extricable error in principle amounting to an error of law, which attracts a correctness standard.

29. The Court of Appeal identified the Trial Judge's errors as follows:

    (a) What was in the contemplation of the City was not determinative of mutual intent.

    (b) It was in fact necessary to determine what was "specifically" contemplated by both parties, apparently referring to the Blackmore rule.

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[14] *Temple v. Bailey*, 2018 NLSC 177 at paras 36-44 ("***Bailey* NLSC**") [Tab 1B, vol. 1, p. 18-22 of the Record]

(c) It was not sufficient that the words of the release covered a subsequent third party action if the surrounding circumstances suggested otherwise.

(d) A trial judge is required to assess the surrounding circumstances for the purpose of determining what an objective bystander would conclude was the specific intent of both parties, and the scope of their understanding.[15]

30. The Court of Appeal held that the Trial Judge's failure to follow these principles had a material effect on the result.[16]

31. In making its decision, the Court of Appeal offered the following guidance:

(a) The "judicial tendency is to interpret releases narrowly."[17]

(b) The Trial Judge erred by relying on the broad language of the release and indemnity agreement to interpret its scope.[18]

(c) The broad language used in the description of the subject matter of the release ("as well as", "and without limiting the generality of the foregoing" and "including but not restricted to") should be disregarded due to a subsequent reference to the specific heads of damages claimed by the driver.[19]

(d) The quantum of the settlement was too low, and was "not inconsistent" with the conclusion that the parties intended to only settle the driver's claims against the City, and not the City's potential contribution to the claims of someone else.[20]

(e) The Trial Judge erred when he failed to consider that contribution and indemnity for the employee's injuries might not have been within the driver's contemplation

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[15] *Bailey v Temple*, 2020 NLCA 3 at paras 50-53 ("***Bailey* NLCA**") [Tab 1D, vol. 1, p. 33 of the Record].

[16] *Ibid* at para 55 [Tab 1D, vol. 1, p. 33 of the Record].

[17] *Ibid* at para 34 [Tab 1D, vol. 1, p. 29 of the Record].

[18] *Ibid* at para 48 [Tab 1D, vol. 1, p. 32 of the Record].

[19] *Ibid* at paras 60-61 [Tab 1D, vol. 1, p. 34 of the Record].

[20] *Ibid* at para 64 [Tab 1D, vol. 1, p. 35 of the Record].

when she signed the agreement, primarily because the driver had given the employee's Statement of Claim to her insurer and she thought they would take care of it.[21]

(f) The City was not aware of the employee's Statement of Claim against the driver, so it could not have expected to benefit from the release of it.[22]

32. The Court of Appeal did not displace the Trial Judge's finding that the City intended to close its file and eliminate the possibility of any further claims from the driver in relation to the accident. It did not displace the Trial Judge's factual finding that the City did not intend to obtain a partial release. It just gave these findings no weight.

33. The decision of the NL Court of Appeal narrows the scope of the release and indemnity agreement, rendering parts of the text meaningless. It represents a dramatic change in the *status quo* for Canadian litigants because it invalidates the portions of a release that defendants regularly rely on to close their files.

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[21] *Ibid* at para 39 [Tab 1D, vol. 1, p. 31 of the Record]

[22] *Ibid* at paras 41-42 [Tab 1D, vol. 1, p. 31 of the Record]

## PART II – STATEMENT OF ISSUES IN QUESTION

34. The issues in question in this appeal are as follows:

(a) What is the standard of review?

(b) What is the law of contractual interpretation as it applies to releases?

(i) Does the Blackmore rule apply?

(ii) Can we ignore the broad and inclusive language in a release?

(iii) Can the context overwhelm the words?

(c) Did the NL Court of Appeal err when it failed to consider the indemnity?

(d) How are the Provincial Appellate Courts interpreting releases?

(e) How are the other common law jurisdictions interpreting releases?

(f) What are the policy implications?

## PART III – STATEMENT OF ARGUMENT

### (a) The standard of review is correctness

35. The interpretation of a contract is normally a question of mixed fact of law[23] for which the standard of review is palpable and overriding error.[24] However, a standard of correctness will apply when it is possible to extract an extricable question of law, such as the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor.[25] These exceptions are rare.[26]

36. In the case at hand, the issue of whether releases are to be interpreted narrowly, i.e. whether the Blackmore rule applies, goes to the correct principle to be applied, which attracts a standard of review of correctness.

### (b) A release should be interpreted in accordance with the normal law of contractual interpretation

37. The law of contractual interpretation in Canada is clearly stated in *Sattva*: we must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[27] While the surrounding circumstances must be considered, they must never be allowed to overwhelm the words of the contract.[28]

38. A release is a contract. There is nothing about a release that justifies the application of any special interpretive rules.

### (b)(i) The Blackmore rule is no longer necessary in Canada

39. When interpreting releases, Canadian courts have sometimes deviated from the normal rules of contractual interpretation by narrowing the scope of the release in accordance with the Blackmore rule.

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[23] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*") at para 50.
[24] *Housen v. Nikolaisen,* 2002 SCC 33 at paras 36 and 37
[25] *Sattva*, *supra* note 23 at para 52.
[26] *Ibid* at para 55.
[27] *Ibid* at para 47.
[28] *Ibid* at para 57.

40. The Blackmore rule provides that that "[t]he general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release."[29]

41. In his leading textbook, Geoff Hall has described the Blackmore rule as "a special rule which is superadded onto the regular ones."[30]

42. The Blackmore rule came about in 19th Century England, when the courts took an approach to contractual interpretation which prohibited any consideration of context.[31] The purpose of the rule was presumably to protect releasors by narrowing the scope of the release.

43. Since that time, the law of contractual interpretation in Canada has evolved to require courts to consider the context in which a release was negotiated and executed. As a result, the Blackmore rule is no longer necessary. The words of the agreement, along with the context, are all that is required to ascertain the intentions of the parties.

44. In the modern day, the Blackmore rule interferes with the parties' ability to contract freely. The rule especially prejudices releasees who might not be aware of it and who, understandably, assume that the words of the release capture its meaning.

45. The requirement of a "superadded" rule on top of the regular rules of contractual interpretation increases uncertainty in contractual relations and increases the likelihood of litigation.

46. Canadian courts are struggling with the Blackmore rule because it contradicts the ordinary law of contractual interpretation.

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[29] *Directors of London & South Western R. Co. v. Blackmore (*1870), L.R. 4 H.L. 610 at p. 623.

[30] Geoff R. Hall, *Canadian Contractual Interpretation Law,* 3d ed. (Toronto: LexisNexis Canada, 2016) at 260.

[31] For example, see *Lovell & Christmas Ltd v Wall,* (1911) 104 LT 85.

47. Some modern decisions ignore the Blackmore rule and apply the ordinary principles of contractual interpretation.[32] Some give it lip service but then fail to apply it.[33] Other Courts have devised various multi-factor tests to apply their versions of the Blackmore rule.[34] Some courts, such as the NL Court of Appeal, allow the Blackmore rule to render parts of the text of the release meaningless.[35] The result is uncertainty in contractual relations and more litigation.

48. Justice Cory, writing for this Court in *Hill v. Nova Scotia (Attorney General)*[36] quoted with approval Justice La Forest (as he then was) in *White v. Central Trust Co.,* who interpreted the Blackmore rule as follows:

> *What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.*[37]

49. While Justice La Forest captures the genesis of the idea that context is crucial to contractual interpretation, he did not go as far as is required today, when context has evolved to be a core aspect of the interpretation process.

50. In the modern day, the Blackmore rule creates confusion and serves no useful purpose.

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[32] *MHR Board Game Design Inc. v. Canadian Broadcasting Corporation*, 2013 ONCA 728, aff'g 2013 ONSC 4457; and, *Filkow et al v D'Arcy & Deacon LLP*, 2019 MBCA 61.

[33] *Biancaniello v. DMCT LLP*, 2017 ONCA 386 at para 42 ("***Biancaniello***")

[34] *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 29 ("***Kaiser***") at para 17; *Terwillegar Towne Residents Association v Brookfield Residential (Alberta) LP*, 2015 ABQB 14 at para 26.

[35] *The Owners, Strata Plan BCS 327 v. IPEX Inc.*, 2014 BCCA 237; *Companies' Creditors Arrangement Act (ON)*, Re, 2006 CanLII 32429 (ON SC).

[36] *Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401 (SCC), [1997] 1 S.C.R. 69 ("***Hill***").

[37] *White v. Central Trust Co.*, 1984 CanLII 3002 (NB CA) ("***White***").

**(b)(ii) We cannot ignore the words in the agreement**

51. The Blackmore rule has the effect of rendering meaningless or reversing the broad and inclusive language used to describe the subject matter of a release. This approach is unworkable.

52. When interpreting an agreement we cannot ignore the words.

53. Specifically, when interpreting the subject matter of a release we cannot ignore the broad and inclusive language used in the description of that subject matter.

54. In the matter at hand, the words of the agreement bar the third party claim at issue.

55. The agreement was a "Full and Final" release. In its first paragraph, the driver agrees to release and "forever discharge" the City from "all...claims" arising out of or relating to the accident.[38] The words are broad and inclusive. They are not ambiguous. They reflect a desire for finality. The agreement, when read as a whole, accords with this interpretation.

56. Yet, the subject matter of the release is not unlimited. It does not prohibit all claims that might arise between the parties. It would not prevent a claim that did not arise from the accident. It merely prohibits all claims that arise from the accident. It uses inclusive phrases such as "as well as", "without limiting the generality of the foregoing" and "including but not restricted to" to describe the unlimited variety of claims that may arise from that specific accident. Nothing in the agreement diminishes the phrase "all…claims" arising from the accident. In fact, the very use of those inclusive phrases means that the parties intended to release more than the driver's damages as plead in her Statement of Claim. The NL Court of Appeal went further than rendering those phrases meaningless, it actually reversed their meaning.

57. The agreement contains an indemnity, the words of which indicate that the driver agrees "to indemnify and save harmless" the City "from any further claims…which may be brought by or on behalf of or in the name of the [driver] for and in respect of any of the

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[38] Release and indemnity agreement dated August 26, 2011 [Tab 20, vol. 2, p. 74 of the Record].

matters or things hereinbefore set forth."[39] On its face this indemnity squarely addresses the third party claim at issue.

**(b)(iii) The context must inform, but not overwhelm the words of the agreement**

58. The meaning of an agreement is borne out in the words of the agreement, but the words cannot be considered in isolation. As stated by Justice Laskin of the Ontario Court of Appeal in his dissent which was adopted by the majority of this Court in *R. v. Resolute*[40]:

> *Context controls meaning. Rarely can the words of an agreement be understood without some knowledge of their context. Thus, as Doherty J.A. said in Starrcoll Inc. v. 2281927 Ontario Ltd.[7]: "The words of an agreement, and the context in which those words are used, cannot be separated and approached at different stages of the interpretative process."*[41]

59. We must consider how the context informs the meaning of the words, without allowing it to overwhelm the words.

60. In *Sattva*, Rothstein J., writing for a unanimous Court, stated that "the surrounding circumstances will be considered in interpreting the terms of a contract" but they "must never be allowed to overwhelm the words of that agreement." [42]

61. The goal of the interpreter in considering the context of an agreement is "to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract."[43]

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[39] Release and indemnity agreement dated August 26, 2011 [Tab 20, vol. 2, p. 75 of the Record].

[40] *R. v. Resolute*, 2019 SCC 60 ("***Resolute***").

[41] *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA, at para 236 ("Justice Laskin's Reasons") citing *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59.

[42] *Sattva, supra* note 23 at para 57.

[43] *Ibid.*

62. While the context is integral to the interpretation, parties cannot use the surrounding circumstances "to deviate from the text such that the court effectively creates a new agreement."[44]

63. In the case at hand the context is sparse.

64. First, there are statements regarding liability. The City considered its position on liability to be strong. It did not cause or contribute to the cause of the accident. The City had a duty to warn motorists of the roadwork and it did so. At the time of the accident, Mr. Temple was standing next to a City truck, which had its emergency lights flashing. A sign was in place marking a construction zone. Mr. Temple was wearing a neon yellow safety vest with reflective tape and a hard hat with reflective tape. The City paid a fine to occupational health and safety for not having all proper safety procedures in place but that does not mean that the City was liable for the accident.[45] In his Statement of Claim against the driver, Mr. Temple alleged that the driver was solely liable for the accident and that, among other things, the driver was driving too fast, she failed to keep a proper lookout, she failed to stop, swerve, or even slow down before striking Mr. Temple.[46]

65. The City's position on liability is a relevant part of the context because it speaks to the value of the release. If the City did not cause or contribute to the cause of the accident then it would pay little to be released from claims arising from it.

66. Second, there is evidence indicating that the City wanted to avoid the cost of litigation. In an email from the City's counsel to the driver's counsel, the City's counsel explained that even if the City was successful at summary trial, it would not recoup its costs.[47] This explained why the City was making a settlement offer, even though it did not think it bore any liability. It was settling in order to avoid the cost of litigating liability.

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[44] *Ibid.*

[45] The Supplementary Affidavit of Dale Park at para 6 [Tab 20, vol. 2, p. 63 of the Record].

[46] Statement of Claim in action number 2011 04G 0049, between David Temple, Plaintiff, and Mary Bailey, Defendant. [Tab 3, vol. 1, pp, 41-42 of the Record].

[47] The Supplementary Affidavit of Dale Park at Exhibit D [Tab 20, vol. 2, p. 86 of the Record].

67. The settlement of $7,500 was based on a denial of liability and an avoidance of litigation costs.

68. Third, there is evidence that the settlement was conditional on the execution of a "Full and Final release." This includes the release of unknown claims. An unknown claim is a claim that arises from the subject matter of the release (in this case the accident) but of which the releasor and/or releasee have received no notice.

69. There is no evidence which suggests that the parties intended to effect a partial release, or that they intended to release only known claims.

70. A draft of the agreement was provided to the driver's counsel for his review. No revisions were requested.[48] Had the driver wanted to limit the agreement to known claims her counsel could have requested that revision.

71. Fourth, there is evidence that the driver was literate, that she read the agreement in advance of executing it, and that she was represented by counsel throughout.[49]

72. Fifth, the Trial Judge found as a fact that the driver had been served with and read the Temple action prior to executing the release.[50] Additionally, at the time of execution, the limitation period had expired in respect of injury claims arising from the accident.[51] As part of the settlement, the driver agreed to discontinue her claim. Any further first party claims were barred by the limitation period. A third party claim is the only type of claim that was not barred by the limitation period. It is the only type of claim that was not extinguished by the discontinuance.

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[48] The Supplementary Affidavit of Dale Park at Exhibit D [Tab 20, vol. 2, pp. 131-133 of the Record].

[49] Answers to Interrogatories of Mary Bailey dated February 10, 2017 [Tab 18, vol. 2, pp. 51-54 of the Record].

[50] Answers to Interrogatories of Mary Bailey dated February 10, 2017 [Tab 18, vol. 2, p. 54 of the Record].

[51] The *Limitations Act*, *supra* note 7 at s. 5(a).

73. Lastly, there is evidence that the driver, and/or her counsel, were anxious to receive settlement funds: her counsel requested a "quick turnaround" in respect of the $7,500 after the release was executed.[52]

***Objective versus subjective evidence of intention***

74. Subjective views cannot be considered when interpreting the agreement. [53] The appropriate perspective is that of an objective, reasonably informed observer. The role of the observer is to determine what the parties intended, not to determine what the interpreter (i.e. the Court) would have intended in the circumstances. This is an important distinction since there is often a temptation for the interpreter to redraft the bargain.

75. The NL Court of Appeal erred when it based its decision on the subjective beliefs of the driver.

76. The NL Court of Appeal relied heavily on its factual finding that "[the driver] brought the statement of claim to her insurers who advised her that they would take care of the matter."[54] The court used this evidence to find that the Temple action was not within the driver's contemplation when she executed the release and indemnity agreement.[55]

77. There is no doubt that the driver knew or ought to have known of the Temple action when she executed the release and indemnity agreement. She had been served with it and she read it. But knowledge and contemplation are not the same.

78. The driver had knowledge of the Temple action, but she (mistakenly) believed that her insurer would take care of it. Belief is subjective.

79. According to this court in *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*[56] and as stated in *Sattva* subjective evidence does not form part of the analysis:

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[52] Supplementary Affidavit of Dale Park at Exhibit D [Tab 20, vol. 2, p. 111 of the Record].
[53] *Sattva*, *supra* note 23 at para 59.
[54] *Bailey* NLCA, *supra* note 15 at para 2.
[55] *Bailey* NLCA, *supra* note 15 at para 39.
[56] *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.* 2020 SCC 29.

> *The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.*[57]

80. As Justice La Forest indicated in *White v. Central Trust Co*: "what the parties may have thought was the effect of an instrument cannot be considered."[58]

81. The NL Court of Appeal erred when it based its decision on the driver's subjective beliefs instead of what she objectively knew.

82. If parties to a release were allowed to escape the consequences of a release because, at the time of execution, they were not contemplating something they objectively knew, then no release would ever be final. The intentions of the parties could never be conclusively known. Releasees could not close their files.

83. Based on the correspondence between counsel, a reasonable observer should conclude that the intentions of the parties were to effect a full and final settlement, allowing the City to close its file. This is what the City wanted and the driver did not object to it.

84. The settlement figure was reasonable because the City had a strong liability position. The City paid for the ability to close its file. It paid for finality.

85. An objective observer would conclude that the driver was satisfied with the form and substance of the release and indemnity agreement. Otherwise, the driver's counsel would have requested revisions. There is nothing in the factual matrix which suggests that the driver intended to narrow the subject matter or exclude third party claims.

86. In the words of the Trial Judge, the context indicates that the parties intended to release the City "from any and all claims and demands which [the driver] might be able to bring against

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[57] *Sattva, supra* note 23 at para 58.

[58] *White, supra* note 37 at para 39.

it as a result of the Accident and thereby close their file and not have to spend any further money dealing with a claim from [the driver]."[59]

87. The NL Court of Appeal erred when it narrowed the subject matter of the agreement by reversing the meaning of the broad and inclusive words in the agreement. It did so despite a lack of objective evidence contradicting that broad and inclusive language. It allowed the "tendency" of a narrow interpretation to overwhelm the words of the agreement.

88. The NL Court of Appeal allowed its narrow interpretation of the subject matter to overwhelm the following aspects of the agreement:

a) the driver's promise to release and "forever discharge" the City from all claims of any kind or nature whatsoever arising out of or related to the accident;

b) her promise to indemnify and save harmless the City from any further claims or demands, actions or suits which may be brought by her or in her name against the City, for and in respect of the matters or things set forth in the release;

c) her declaration that she fully understood the terms of the agreement; and,

d) her declaration that she executed the agreement with "full knowledge of any and all rights" which she might have as against the City.

89. The NL Court of Appeal also erred when it overturned the Trial Judge's decision on the basis that he incorrectly took the words of the agreement into consideration in order to ascertain the intentions of the parties.

90. The NL Court of Appeal's approach departed from the approach taken by this Court in *Resolute*.

91. *Resolute* involved the interpretation of an indemnity given by the Province of Ontario to Resolute's corporate predecessor. At issue was whether the indemnity covered a regulatory order issued by the Province of Ontario.

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[59] *Bailey* NLSC, *supra* note 14 at para 40.

92. The majority of this Court adopted the dissenting reasons of Justice Laskin in the Ontario Court of Appeal and found that the indemnity did not cover the regulatory order.[60]

93. Justice Laskin reaffirmed the interpretative principles set out in *Sattva*. As part of his contextual analysis he examined the structure of the indemnity and found that there was evidence that the parties intended to limit the indemnity to third-party claims. Specifically, certain clauses in the indemnity which required Resolute to notify and cooperate with the Province of Ontario in the defence of the claims made no sense if the indemnity covered first party claims brought by the Province itself. [61] This encouraged Justice Laskin to interpret the phrase "any obligation …incurred…as a result of any claim, action or proceeding" so as to exclude first party claims.[62]

94. Justice Laskin found that the indemnity, when read as a whole, reflected the parties' intentions which were to provide indemnity only in regards to third party claims.[63]

95. In *Resolute* this Court recognized that if an analysis of the context renders parts of the agreement meaningless, then that interpretation is unsustainable.[64]

96. In the present case, the NL Court of Appeal erred when it adopted an interpretation that rendered parts of the agreement meaningless (including the broad and inclusive words such as: "as well as"; "and without limiting the generality of the foregoing"; and "including but not restricted to"). Such an interpretation is unsustainable.

**(c) The NL Court of Appeal erred when it ignored the indemnity**

97. The agreement at issue contains an indemnity provision which was not considered by the NL Court of Appeal.

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[60] *R. v. Resolute,* 2019 SCC 60, at para 3.

[61] Justice Laskin's Reasons, *supra* note 30 at paras 266-269. See also *'Measure Once, Cut Twice': Weyerhaeuser Company Ltd. v. Ontario (Attorney General) and the Interpretation of Indemnities*, Canadian Business Law Journal, Vol. 62, No. 1, pp. 1-34, June 2019.

[62] *Ibid.*

[63] *Ibid*.

[64] *Resolute, supra* note 43 at paras 32 and 33.

98. The indemnity is unusual in that it covers only claims brought by or in the name of the driver against the City in relation to the accident.[65]

99. The purpose of the indemnity is to protect the City from further costs in relation to claims brought "by or on behalf of or in the name of" [66] the driver.

100. The clause reflects the parties' intentions to capture the costs associated with the defence of subrogated claims and third party claims.

101. The words of the indemnity capture the third party claim at issue. There is nothing in the remainder of the agreement or in the factual matrix which suggests that the indemnity was not meant to cover the third party claim at issue. Unfortunately, the NL Court of Appeal did not discuss the indemnity, and it is unclear how it factored into the court's decision, if at all.

**(d) Canadian appellate jurisprudence: a cautionary tale featuring the Blackmore rule**

102. Various Canadian appellate courts have considered the general interpretative principles applicable to releases. Most reference the Blackmore rule.

103. In *Bank of British Columbia Pension Plan v. Kaiser*[67] Kaiser was the former CEO of the Bank of British Columbia. He had signed up for, and was entitled to, the bank's regular staff pension and supplementary retirement income plan.

104. In 1986, the bank was purchased by HSBC, and Kaiser agreed to accept approximately $1 million in "full settlement of salary … and all other payments or benefits due or accruing due under any agreement or arrangement with the bank." The agreement provided that the supplemental retirement income agreement was cancelled, but did not mention the staff pension plan. When the bank's staff pension plan was being wound up, Kaiser claimed under the distribution.

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[65] Release and indemnity agreement dated August 26, 2011. [Tab 20, vol. 2, p. 75 of the Record].
[66] *Ibid*.
[67] *Kaiser*, *supra* note 34.

105. Reading the release agreement, the Court found that the intent of the parties was to "completely sever their relationship."[68] The release allowed Kaiser to "leave the bank with honour and integrity; it permitted the bank to make a clean start to solving its financial woes under new leadership. [69] The British Columbia Court of Appeal interpreted the release agreement broadly to include the staff pension plan, though it was not specifically mentioned.

106. In doing so, the BC Court of Appeal cited approvingly five points from the seven-point test set out in *Chitty on Contracts:*

> *1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.*
>
> *2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.*
>
> *3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.*
>
> *4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.*
>
> *5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.*[70]

107. Parts of the test reflect what came to be confirmed as the law of contractual interpretation in *Sattva*. Other parts apply the principles of the Blackmore rule, narrowing the scope of the release.

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[68] *Kaiser, supra* note 34 at para 23.

[69] *Ibid* at paras 23 and 25.

[70] *Ibid* at para 17.

108. In spite of parts 2 and 4 of the test, the BC Court of Appeal seems to have given effect to the broad language in the release. It did so because nothing in the context contradicted the broad language.

109. Another source of confusion is the question of whose intention is to be considered. According to the BC Court of Appeal in *Kaiser*, the court must consider "the intention of the party by whom it was executed."[71] (Underline added)

110. This approach was clarified by this Court in *Sattva*, when Justice Rothstein stated that the court must consider the objective evidence regarding the "intentions of the parties".[72] [underline added]

111. The NL Court of Appeal erred when it favoured evidence regarding what was in the contemplation of the driver over the objective evidence regarding the intentions of the City.

112. The NL Trial Judge correctly found that the City's intention "was that they would be released from any and all claims and demands which [the driver] might be able to bring against it as a result of the Accident and thereby close their file and not have to spend any further money dealing with a claim from [the driver]."[73] This finding was based on objective evidence regarding the intentions of the City.

113. While the NL Court of Appeal did not displace this finding, it found that the intention of the City was not "determinative" of mutual intent. Although it is correct that it is not "determinative", it cannot be ignored. It is part of the context that must be considered.

114. The NL Court of Appeal erred when it allowed its finding regarding what was in the contemplation of the driver to overwhelm the words of the agreement and the objective evidence regarding the intention of the City.

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[71] *Kaiser*, *supra* note 34 at para 17.

[72] *Sattva*, *supra* note 23 at para 55.

[73] *Bailey* NLSC, *supra* note 14 at para 40.

115. The Ontario Court of Appeal interpreted a broadly worded release in *Biancaniello v. DMCT LLP.*[74] *Biancaniello* involved a dispute between an accounting firm and its client. The client failed to pay the bill, so the accountants sued for payment. In its defence, the client alleged that the accountants' services were deficient. The claim was settled for $35,000. The accompanying release released the accountants from:

> *all manner of actions…which against each other they had, now have or hereafter may, can or shall have for or by reason of any cause, manner or thing whatsoever existing to the present time with respect to any and all claims arising from any and all services provided by* [the accountants] *to* [the client] *through to and including December 31, 2007…*[75]

116. Four years after the release was given, the client learned that, as a result of the accountants' deficient work, it could be subject to a tax liability of $1.24 million. It sued the accountants for $3m. The accountants filed a motion for summary judgment to dismiss the action on the basis that it was barred by the release.

117. The Ontario Court of Appeal allowed the motion and dismissed the claim on the basis that it was barred by the release. The Court cited *Bank of Credit and Commerce International SA v. Munawar Ali*[76], a decision of the House of Lords, in which Lord Nicholls (concurring), agreed that unknown claims are covered by broad general language, relying on the need for finality:

> *The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary,* ***part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality.*** *When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable.* ***The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release.*** *The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very*

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[74] *Biancaniello, supra* note 33.

[75] *Biancaniello, supra* note 33 at para 6.

[76] *Bank of Credit and Commerce International SA v. Munawar Ali,* [2001] UKHL 8; [2001] 1 All E.R. 961 ("***Ali***").

> *risk that the release was intended to protect the person in whose favour the release was made.*[77] [Emphasis added]

118. As the Ontario Court of Appeal stated: for the bank in *Ali*, the purpose of the release was finality.[78] The House of Lords concluded that the release in *Ali* included unknown claims but not inconceivable claims such as the claim at issue which was for stigma damages, since the stigma tort did not exist in England when the release was executed.[79]

119. Relying on *Ali*, the Ontario Court of Appeal articulated the following five principles governing the interpretation of releases:

1. One looks first to the language of a release to find its meaning.

2. Parties may use language that releases every claim that arises, including unknown claims. However, courts will require clear language to infer that a party intended to release claims of which it was unaware.

3. General language in a release will be limited to the thing or things that were specially in the contemplation of the parties when the release was given.

4. When a release is given as part of the settlement of a claim, the parties want to wipe the slate clean between them.

5. One can look at the circumstances surrounding the giving of the release to determine what was specially in the contemplation of the parties.[80]

120. As in *Kaiser*, parts of the test accord with the ordinary law of contractual interpretation described in *Sattva*, while other parts of the test reflect aspects of the Blackmore rule. As in *Kaiser*, the Ontario Court of Appeal gave effect to the broad language of the release.

121. In *Biancaniello* the party who paid $35,000 were seeking to recover $3m. The gap between what they perceived their position to be when they executed the agreement and what they

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[77] *Ibid* at para 21.

[78] *Biancaniello, supra* note 33 at para 39.

[79] *Biancaniello, supra* note 33 at para 40, citing *Ali, supra* note 76 at para 75.

[80] *Biancaniello, supra* note 33 at para 42.

perceived it to be some 4 years later was $3,035,000. According to the ON Court of Appeal, this gap did not invalidate the release.

122. In the case at hand, we know that the City paid $7,500, but there is no evidence in the record regarding whether that settlement was commercially reasonable. We know that the City based the offer on what it perceived to be its strong liability position and to avoid litigation costs, but we do not know whether the City was actually liable and we have no idea of the extent of Mr. Temple's damages. It is not the Court's role to fill this evidentiary void. Doing so threatens the stability of the law of contractual interpretation, it threatens the predictability of contractual relations and the ability of the parties to contract freely.

123. The Newfoundland and Labrador Court of Appeal erred when it found that the $7,500 settlement figure did not accord with an interpretation of the release that barred the third party claim. The finding lacked any evidentiary basis.

124. In *Taberner v. World Wide Treasure Adventures Inc*. the British Columbia Court of Appeal stated that a "full and final release," described by the court to be in the "general form," must be interpreted very liberally:

> *…more importantly the release is stated to be a full and final release and I think that the clause must be given a very general interpretation because of the kind of release it was intended to be".* [81]

125. The NL Court of Appeal's approach of ignoring, or narrowing, the broad and inclusive language is inconsistent with the approach taken in other Canadian jurisdictions and this Court's approach in *Sattva*.

126. The NL Court of Appeal began its analysis of the agreement by stating that "[t]he judicial tendency is to interpret releases narrowly."[82] If this statement represents an interpretive principle, it presents a marked departure from the principles set out in *Sattva* where this Court directed that contracts should be interpreted neither narrowly nor broadly but in

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[81] *Taberner v. World Wide Treasure Adventures Inc*, 1994 CanLII 2062 (BC CA) at para 7.

[82] *Bailey* NLCA, *supra* note 15 at para 34.

accordance with the intentions of the parties. The statement also conflicts with the decisions of the appellate and trial courts of other jurisdictions.

127. The goal of contractual interpretation is to ascertain the intentions of the parties.[83] As we saw above, how Canadian courts have ascertained those intentions in regards to release agreements is varied and requires clarification.

128. The Blackmore rule has caused much of the confusion. Courts that apply the Blackmore rule find themselves trying, and failing, to reconcile intention with what was "specially in the contemplation of the parties at the time when the release was given."

129. The word "specially", often misquoted as "specifically"[84], causes the first difficulty because the word has fallen out of popular use. Merriam-Webster's dictionary defines "specially" as "in a special matter"; "for a special purpose"; or, "in particular". Either way, the word along with the phrase "limited always" serve a limiting function, they limit the intentions of the parties to only that which was in their contemplation at the time of execution.

130. In the modern day, such limiting, or narrowing of the scope of the release, is inappropriate and unnecessary. Narrowing the scope of a release when there is no objective evidence that the parties intended to do so is arbitrary and misleading. Further, it frustrates the parties' ability to agree freely.

131. The second difficulty is the difference between "contemplation" and "intention", especially as they relate to unknown claims. Merriam-Webster's dictionary defines "contemplation" as the act of "considering with attention" or "regarding steadily." What is in the contemplation of the parties refers to the subject matter the parties were thinking about whereas the intentions of the parties refers to what they were intending to agree to in the release. These are two different considerations.

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[83] *Sattva*, *supra* note 23 at para 55.

[84] The NL Court of Appeal misquotes the word as "specifically" in the judgment at paragraph 51.

132. Applying a test that limits a release to what was in the contemplation of the parties almost certainly prohibits the release of unknown claims, even in cases where the parties intended to release unknown claims. It limits the release even when there is no objective evidence that the parties intended to do so.

133. A superadded rule that says that the parties do not intend to mean what they say is absurd and obstructionist.

134. When a court is engaged in the exercise of interpreting a release, the difference between applying the ordinary rules and applying the Blackmore rule boils down to who has the onus to clarify intention. When the Blackmore rule is applied, the releasee is burdened with a superadded onus to clarify intention.

135. This is consistent with the 2017 finding of the Ontario Court of Appeal in *Biancaniello*. As was adeptly noted by Lisa A. Peters, Q.C. in her article about *Biancaniello*:

> *This seems to me to constitute a notable shift in the interpretative approach. Rather than starting with the proposition that a party seeking to capture unknown or unformed claims (the releasee) has to ensure that explicit words to that effect are included, the onus instead is on the releasor to explicitly exclude them from the release (at least as regards undiscovered (unknown claims)).*[85]

136. According to the Blackmore school of cases, broad and general language in a release is to be overwhelmed (or its meaning reversed) by the overarching assumption that the parties intended the release to be interpreted narrowly. If an unknown claim is to be released then the releasee bears the onus of including explicit language in the release. What language would suffice is unknown.

137. Whereas according to the *Sattva* school of cases, if the release is broadly worded to include unknown claims, then the releasor bears the onus of revising the release to exclude such claims if the intention is to exclude them.

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[85] Peters Q.C., Lisa, *Contract Law Update; Developments of Note (2017)*, retrieved at <https://www.lawsonlundell.com/assets/htmldocuments/2017%20Contract%20Law%20Update.pdf>.

138. In the modern day, when context must be considered to determine the intention of the parties, there is no legitimate reason to assume that the parties intended a release to be interpreted narrowly, absent objective evidence of such an intention.

139. In the matter at hand there is no objective evidence that the parties intended for the release to be interpreted narrowly. The driver's counsel was given the opportunity to review the agreement and he failed to request any revisions. He had the onus and the opportunity to narrow the agreement and he failed to do so. It must be concluded that the intention of the parties was to give effect to the broad words in the agreement.

140. The Blackmore rule is also off-sides with the decision of McLachlin J. (as she then was) in *Karroll v. Silver Star Resorts* where she applied the principle that a contract can bind a signatory even if "he has not read it and does not know its contents."[86]

141. A court following the Blackmore rule takes a radically different view of a release. Such a court would hold that even when a releasor has read a release, and has signed it in the presence of her lawyer, she will not be held to the natural effect of its unequivocal words (even if that is what the other party clearly intended).

142. The City submits that releases are not so different from other types of contracts that radically different approaches to interpretation should apply.

143. A shift away from the Blackmore rule would bring the law of interpretation of releases in line with the ordinary law of contractual interpretation. Such concordance increases certainty in contractual relations, reduces the cost of litigation, and simplifies the parties' ability to contract freely and give effect to their intentions.

***Unknown claims are released by a release of "all claims". More words would not assist***

144. Parties to a release may intend to release unknown claims. If a release is drafted to reflect that intention then any interpretation of that release should have that desired effect.

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[86] *Karroll v. Silver Star Resorts*, 33 BCLR (2d) 160 at para 70, *citing L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 at 403 (C.A.)

145. An application of the interpretative principles in *Sattva* confirms that the release and indemnity agreement at issue bars unknown claims.

146. The ordinary and grammatical meaning of the words of the agreement bars unknown claims.

147. Firstly, the words "all demands and claims of any kind or nature whatsoever arising out of or relating to the accident" encompasses unknown claims.

148. According to the Ontario Court of Appeal in *Biancaniello* the phrase "all claims arising from the services provided by the accountants up to the end of December 2007" included unknown claims. The court reasoned as follows:

> *Although the release does not specifically say that it includes unknown claims, it includes all claims arising from the services provided by the accountants up to the end of December 2007. By including all claims, but limiting the description of the claims that are intended to be covered both by subject matter and by time frame, there is no need to further specify the types of claims that are included. The language is specific and fully understandable: it includes all claims related to professional services provided during the specified time frame. There is no need, for example, to say, "including tort claims, negligence claims, breach of contract claims, costs claims", etc. They are all included unless specifically excluded.* ***The same analysis applies to unknown claims – by specifying the claims contemplated by the parties and describing them inclusively, all claims in the defined category are included unless specifically excluded. Had it said "including known and unknown claims", that would just have been another way of saying that the release includes all claims.***
>
> *In my view, the language used by the parties in this release was clear and unequivocal in its intent and effect. The Divisional Court did not find the language "exceptionally comprehensive" enough to include the claim that arose. I do not agree.* ***More words would not assist. I agree with the observation by Lord Hoffmann in Ali, at para. 38, that the solution does not lie with more verbiage.***[87] [Emphasis added]

149. Similarly, in the case at hand, more words would not assist. The reference to "all claims" in the agreement includes unknown claims.

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[87] *Biancaniello*, *supra* note 33 at paras 49-50.

150. Secondly, the release and indemnity agreement at issue explicitly includes the words "foreseen and unforeseen" indicating an intention to release unknown claims. [88]

151. Thirdly, when the agreement is read as a whole it becomes even more apparent that the intention of the parties was to bar unknown claims. For example, at page three of the agreement the driver instructs her solicitor to discontinue her action against the City.[89] Since the limitation period has passed, this clause alone is sufficient to bar any further first party claims brought by the driver against the City in regards to the accident. The remainder of the agreement then must release the City from something more, otherwise it would be entirely redundant. The remainder of the agreement releases the City from other claims, including unknown claims.

152. Lastly, an analysis of the context reveals that the parties intended to release unknown claims. The evidence shows that the City intended to obtain a "full and final" release so that it could close its file. This would naturally include unknown claims; otherwise the City could not close its file.

153. Importantly, there is no evidence which suggests that the driver did not intend to release unknown claims. The driver's counsel had the opportunity to review the agreement and he failed to request any revisions.

154. Both parties were aware of the facts of the accident but only the driver was aware of the Temple action. From the City's perspective it was an unknown claim, the very type of unknown claim that the agreement was intended to release.

**(e) Comparative review: UK and Australian jurisprudence**

155. Modern UK jurisprudence regarding contractual interpretation has followed an approach that is similar to *Sattva*. The leading UK decision is *Arnold v Britton*[90] which involved a dispute over a service charge clause in a 99 year lease.

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[88] Release and indemnity agreement dated August 26, 2011. [Tab 20, vol. 2, p. 74 of the Record].
[89] Release and indemnity agreement dated August 26, 2011. [Tab 20, vol. 2, p. 76 of the Record].
[90] *Arnold v Britton*, [2015] UKSC 36.

156. The text of the clause provided that the service charge to be paid by the tenants was 90 pounds, and was to increase by 10 percent every year. The landlords interpreted this to mean that the service charge would be 1 million pounds by the end of the lease. The tenants interpreted the clause to mean that they were required to pay the landlord's actual service costs, with the figure set out in the clause as a maximum cap on service costs.

157. For the majority, Lord Neuberger set out the following general principles governing the construction of a written contract, in terms which echo Rothstein J's decision in *Sattva* the year before:

> *When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. … That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*[91] (Citations omitted)

158. Lord Neuberger cited seven factors as important in the construction of contracts. First, Lord Neuberger echoed Rothstein J. in *Sattva*, stating that the surrounding circumstances should not be permitted to overwhelm the words of the contract:

> *First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*[92]

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[91] *Ibid* at para 15.

[92] *Ibid* at para 17.

159. Lord Neuberger acknowledged that the less clear the words of the contract, the more readily the court can "depart from their natural meaning." However, Lord Neuberger cautioned that this:

> *…does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.*[93]

160. Lord Neuberger next observed that the interpreter of the contract should not depart from what the words mean because it has worked out badly for one of the parties. The Court should not "correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight."[94]

161. On the facts, Lord Neuberger held that the landlord's interpretation was correct, and that the tenants would have to pay increasingly high service charges.

162. In the specific context of releases, the five principles set out by the Ontario Court of Appeal in *Biancaniello* were extracted from the UK decision in *Ali*, where Lord Nicholls observed that "[g]eneral releases are often entered into when parties …want to wipe the slate clean."[95]

163. Lord Nicholls further stated that when parties sign general releases, they usually intend that the release should not be confined to known claims, in an attempt to achieve finality:

> *…. The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the*

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[93] *Ibid* at para 18.

[94] *Ibid* at para 20.

[95] *Ali*, *supra* note 76 at para 23.

> *person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made. …*[96]

164. Following *Ali*, the UK jurisprudence has continued to emphasize that releases should be construed in the same manner as other contracts, and that broadly worded releases can capture claims unknown to the parties.

165. In the UK case of *Khanty-Manisyk Recoveries Ltd v. Forsters LLP*[97] there was a dispute between a lawyer and client over fees. The matter was settled and the release stated that the agreement was in "full and final settlement of all or any Claims which the parties have, or could have had, against each other (whether in existence now or coming into existence at some time in the future, and whether or not in the contemplation of the Parties on the date hereof)". The subject matter was defined as "… any claim … arising out of or in connection with the Action or the invoice."

166. The client subsequently discovered that the legal work had been deficient. It sought to bring a claim for breach of contract and negligence against the law firm.

167. As a starting point, the court referred to *Ali*, and accepted as a general proposition that general release clauses should be construed in the same manner as the terms of any other contract, and that no special rules applied to their interpretation. In fact, "each case must turn on the particular form of words used by the parties in the context of the specific case."[98]

168. The plaintiff argued that the scope of the release clause in the settlement agreement should be limited by the surrounding circumstances. In particular, the claimant argued that in the absence of clear language, the court will be slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.

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[96] *Ali*, *supra* note 76 at para 27.

[97] *Khanty-Manisyk Recoveries Ltd v. Forsters LLP*, [2016] EWHC 522 (Comm), aff'd [2018] EWCA Civ 89.

[98] *Ibid* at para 28.

169. The Trial Judge disagreed. While recognizing that the claim in relation to negligent advice was not "suspected" at the time the release was signed, the court held that the objective bystander could not and would not have said that the new claim was "impossible." The court found that properly construed, the release was sufficiently wide to settle unknown claims relating to the same subject matter.[99] The decision was upheld on appeal.

170. In 2014, the High Court of Australia set out similar principles to govern contractual interpretation in *Electricity Generation Corporation v Woodside Energy Ltd* [100], where the majority stated as follows:

> *[T]his Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. This approach is not unfamiliar. As reaffirmed,* ***it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'****. As Arden LJ observed in Re Golden Key Ltd, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties ... intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'.*[101] (Footnotes omitted)(Emphasis added)

171. In *Newey v Westpac Banking Corporation*[102], the Australian, New South Wales District Court of Appeal applied these principles to the interpretation of a release. It cited *Woodside* for the proposition that that a contextual approach is required, regardless of whether the provisions are ambiguous. However, like in *Sattva*, it cautioned that words themselves should not be eliminated or changed to avoid an inconvenient or unjust result:

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[99] *Ibid* at para 41.

[100] *Electricity Generation Corporation v Woodside Energy Ltd*, [2014] HCA 7.

[101] *Ibid* at para 35.

[102] *Newey v Westpac Banking Corporation*, [2014] NSWCA 319.

> *Nonetheless it is also important to bear in mind the extent to which context and legitimate surrounding circumstances can be used as an aid in the construction of a written agreement. In McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liq) Bathurst CJ (Macfarlan JA and Sackville AJA agreeing) said:*
>
> > *[17]... Whilst it is correct in my opinion that context and the surrounding circumstances known to both parties can be taken into account even in cases where there is an absence of apparent ambiguity* ***that does not permit the Court to depart from the ordinary meaning of the words used by the parties merely because it regards the result as inconvenient or unjust****.*[103] (Emphasis added; citations omitted)

172. In summary, the UK and Australian courts interpret releases in accordance with the words unless there is an ambiguity, in which case they consider the context, which may not overwhelm the words of the agreement. Many of these courts reference the importance of finality.

173. Finality requires the release of known, and unknown claims in regards to a particular subject matter. In fact, the release of unknown claims is arguably more important, as the process of discontinuing or dismissing the action combined with the passing of a limitation period usually prevents the known claim from being pursued by the releasor. The release is often the mechanism wherein the releasor agrees to release unknown claims.

**(f) Limiting principles have deleterious policy implications**

***The NL Court of Appeal's approach undermines finality, predictability, certainty and the ability of the parties to contract freely***

174. The NL Court of Appeal erred when it rendered parts of the wording of the agreement meaningless (or reversed their meaning) and it erred when it deemed the "full and final" release to be a partial release. In so doing, it prevented the City from achieving finality. Finality is crucial to litigants. It is an important part of what releasees are purchasing in exchange for settlement funds. Parties need to be able to settle files and close them.

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[103] *Ibid* at para 90.

175. If the NL Court of Appeal's approach persists, releases will no longer be an effective barrier for third party or subrogated claims. This lack of finality reduces the value and attractiveness of settlement.

176. This is particularly important in jurisdictions such as Newfoundland and Labrador where the possibility of a third party claim can linger indefinitely. Many claims are settled before a defence has been filed. If a defence has not been filed, a third party claim can be issued at any time without leave.[104] No deadline or limitation applies. If the decision of the Court of Appeal is allowed to stand, a matter such as this one could be settled and a third party claim could arise 5, 10 or 15 years later. This would result in prejudice and financial uncertainty for releasees.

177. The approach taken by the NL Court of Appeal jeopardizes freedom of contract. This court has recognized the importance of freedom of contract.[105] In the context of a release, if the parties agree to end all litigation between them in regards to certain subject matter then they should be able to draft a written contract which codifies that agreement. The Blackmore rule and the approach taken by the NL Court of Appeal makes that extremely difficult, and virtually impossible if the parties are not aware of the existence of the superadded interpretative rule.

178. Predictability is also fundamental to contractual relations and the avoidance of litigation. As stated by Aaron D. Goldstein in *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation:*

> *We cannot do away with formalist conventions, such as rules limiting extrinsic evidence, without reducing the law of contracts to pure questions of equity, the outcomes of which are difficult to predict, and therefore, not conducive to stable commerce.*[106]

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[104] *Limitations Act*, *supra* note 7 at s. 11(1).

[105] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 at para 70.

[106] Aaron D. Goldstein, "The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation, "53 Santa Clara L. Rev. 73 (2013) at p. 141.

179. When parties draft and sign a contract, what they are doing is documenting what they intended to agree to. For that reason alone, the contract is, with limited exception, the best evidence of the agreement.

180. The parties expect to be able to rely on the words of the contract as the embodiment of their intentions. An embodiment they mutually agreed to. As a result, the parties often do not invest in the costly preservation of the contextual evidence that would otherwise be required to prove their intentions. Instead, they invest in the preparation of the contract.

181. The contract is the culmination of the negotiation, and this is why the context must not overwhelm the words of the contract.

182. The law encourages parties to refine their intentions in a written contract because it increases predictability, and reduces litigation and uncertainty. When an intention is unambiguously stated in a contract, it discourages litigation. When parties do not have a written contract, the likelihood of litigation increases.

183. What if the context *was* allowed to overwhelm the words of the agreement? Parties would need to invest in preserving better evidence of the context. But to what end?

184. To provide an example based on the case at hand, if the parties had spent more time detailing their negotiations and intentions in their correspondence, the result would merely be a more long-winded and confusing version of the contract. And how would courts interpret the words used in that correspondence? Courts are no further ahead when they take that approach.

***The NL Court of Appeal's approach encourages withholding of information***

185. The NL Court of Appeal's finding regarding what was within the contemplation of the releasor when she executed the agreement will encourage releasors to withhold relevant information from releasees in the hopes of obtaining an advantage.

186. In *York University v. Michael Markicevic*, the Ontario Superior Court cited *Ali* for the proposition that a knowledge imbalance between contracting parties must be carefully supervised, and a party with knowledge should not be allowed to take advantage of a party without knowledge:

> *…where the party receiving the benefit of the release knew that the other party might have a claim and also knew the other party was ignorant of the claim, taking a general release without disclosing the existence of the possible claim would constitute unacceptable sharp practice for which a remedy should be provided.* [107]

187. The effect of the NL Court of Appeal decision is that a party with greater knowledge can frustrate the intentions of a party with lesser knowledge as to the effect of unequivocal contract language merely by remaining silent.

188. The releasor receives the benefit of settlement funds but escapes the consequences of the release, as they are unambiguously written.

189. The outcome is even more egregious when, as was the case here, the releasor declared in the release that she fully understood the terms of it and that she executed it with full knowledge of any and all rights she may have had as against the releasee.

190. A party that reads the words in an agreement, but decides to ignore them, should not be rewarded for doing so.

## PART IV – SUBMISSIONS ON COSTS

191. The Appellant requests that costs be awarded to the Appellant.

## PART V – ORDER SOUGHT

192. The Appellant respectfully requests an order vacating the judgment rendered by the Newfoundland and Labrador Court of Appeal on February 4, 2020, and affirming the decision of the Trial Judge, with costs.

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[107] *York University v. Michael Markicevic*, 2013 ONSC 378, at para 52.

## PART VI – SUBMISSIONS ON CONFIDENTIAL INFORMATION

193. There is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file that could have any impact on the Court's reasons in the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Signed: November 9th, 2020

**STEWART McKELVEY**
**Erin E. Best**
**Giles W. Ayers**

**Counsel for the Appellant**

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