Releasing the Unknown: Theoretical and Evidentiary Challenges in Interpreting the Release of Unanticipated Claims

*Daniele Bertolini**

This paper examines the theoretical and evidentiary challenges associated with interpreting the release of claims that are unknown to private parties at the time the release is executed. It has three objectives. First, the author examines the relevant case law concerning the judicial enforcement of releases of unknown claims. The author shows that courts regularly apply the doctrinal framework of objective contractual interpretation, while at the same time they state that the scope of the release is limited to the claims that are contemplated by the parties at the time of the execution of the release. The unclear relationship between objective intention and contemplation requirement is at the root of the legal uncertainty surrounding the determination of the scope of the release. Second, the author contends that the doctrinal framework of objective contractual interpretation confusingly characterizes the judicial task. When deciding whether unknown claims are included within the scope of broadly worded releases, courts do not engage in a genuine interpretive effort; rather, they engage in a gap-filling exercise. They determine how the risk of unanticipated claims should be allocated on the basis of what may reasonably be imposed on either the releasor or the releasee. Finally, the author proposes a default rule to provide guidance on the judicial allocation of the risk associated with unknown claims. The proposed rule consists of the three principles: (1) courts should presume that generally worded releases are objectively intended to release all claims that are discoverable with reasonable diligence by the parties at the time the release was executed; (2) the plaintiff-releasor advancing an unanticipated claim should bear the burden of proving that at the relevant time, they could not, with reasonable diligence, have acquired knowledge of the claim; (3) the plaintiff's knowledge of a claim is evidenced by their knowledge of the elements constituting a claim. The author contends that by adopting such proposed principles, Canadian courts will see an incremental improvement in both legal certainty and predictability in cases concerning the effect of general releases on unknown claims.

* Associate Professor, Ted Rogers School of Management, Law and Business, Toronto Metropolitan University. I would like to extend my appreciation to anonymous reviewers for providing very thoughtful and constructive suggestions leading to significant improvements. Errors and omissions remain my own.

Introduction

This paper is concerned with the release of claims that are unknown to private parties at the time the release is executed.[1] A release is a contract whereby one or more parties relinquish legal claims to preclude future litigation. Typically, in a release agreement, the *releasor* agrees to discharge the releasee from one or more claims identified in the releasing instrument, while the *releasee* seeks to obtain protection against subsequent assertions of the released claims by the releasor. The release fulfills vital functions within the legal system. It enables private parties to achieve a final definition of their mutual relationship (finality), thereby promoting legal certainty. It allows parties to allocate the risk associated

1. I will not discuss the various grounds upon which the validity of a release can be challenged (such as duress, unconscionability, or the doctrine of mistake). This analysis assumes there is sufficient unvitiated consent to uphold the release.

with future claims, thereby pricing their transactions more accurately. By facilitating the final contractual resolution of disputes, the release reduces litigation costs and encourages judicial efficiency. These beneficial effects occur only to the extent that the releasing instrument clearly defines the scope of the claims being released. Interpretive uncertainty over the scope of the release reduces private parties' motivation to enter into a release agreement and incentivizes their recourse to judicial litigation, thereby undermining the goals of legal certainty and judicial efficiency.

Determining the scope of the release is a matter of interpretation. One major challenge confronted by the releasing parties is allocating the risk of claims that are *unknown* to them at the time the release is signed. There is an imprecision inherent in the task of accounting for unknown claims, which increases the risk of disputes over which issues the parties intended to release. As Cass observes, the releasee often views the release as an assurance that the releasor will not be able to commence further litigation against them, "even if a previously unknown claim surfaces or if the [releasor] discovers facts supporting a new claim that were not known".[2] On the other hand, when a previously unknown claim materializes, the releasor may have reason to argue that they did not intend to surrender rights and claims of which they were unaware or could not have been aware when they signed the release. The divergence of the parties' interpretations regarding the scope of the release gives rise to disputes in which typically the releasor acts as plaintiff, arguing that their claim does not fall within the scope of those previously released, while the releasee acts as defendant, contending that the claim should be barred because it was previously intended to be relinquished. This is a vexing issue not only when the release document fails to address the issue of unknown claims (gap in the releasing document), but also when the release incorporates all-encompassing language covering all claims that may be advanced by the releasor against the releasee (general release). This latter scenario frequently leads to litigation over the scope of the release and brings to the fore the competing interests of the plaintiff-releasor and the defendant-releasee.[3]

2. Fred D Cass, *The Law of Releases in Canada* (Aurora: Canada Law Book, 2006) at 93.

3. See *Privest Properties Ltd v Foundation Co of Canada Ltd* (1997), 145 DLR (4th) 729, 36 BCLR (3d) 155 [*Privest*]; *IAP Claimant H-15019 v Wallbridge*, 2020 ONCA 270 [*IAP Claimant*]; *Hill v Nova Scotia (Attorney General)*, [1997] 1 SCR 69, 142 DLR (4th) 230 [*Hill*]; *Bank of Credit and Commerce International SA v Munawar Ali*, [2001] UKHL 8 [*Ali*]; *Strata Plan BCS 327 v Ipex Inc*, 2014 BCCA 237 [*Strata*]; *Bank of Montreal v Irwin*, (1995), 124 DLR (4th) 73, 6 BCLR (3d) 239 [*Irwin*]; *Bank of British Columbia Pension Plan v Kaiser*, 2000 BCCA 291 [*Kaiser*]; *Biancaniello v DMCT LLP*, 2017 ONCA 386 [*Biancaniello*].

In drafting the releasing document, releasing parties are confronted with the following dilemma: they must use broad contractual language to cover all (known and unknown) claims and thereby attain finality; however, when an unknown claim materializes, the use of such general language results in interpretive uncertainty over which claims fall within the scope of those previously released. This dilemma stems from the contractual instrument used by the parties—the generally worded release—which is inherently conducive to an indeterminate scope of the release.[4] In short, parties pursue finality by broadening the scope of the release, but a broader scope leads to greater indeterminacy of the release, which ultimately undermines the goal of finality.

When an unanticipated claim arises, the interpretive tension between text and context must be resolved. The broader the language of the release, the likelier the wording will conflict with the extant circumstances. When taken literally, the general language of the release is often wide-ranging enough to cover all possible claims (including unknown claims) by the releasor against the releasee. At the same time, circumstances may indicate that at the time the release was drafted, the parties did not objectively intend to define the scope so expansively. In other words, while the text may support the conclusion that *any* unknown claim is included in the scope of the release, the context may show that the parties intended to release *only* claims that arise in relation to a particular dispute. This tension between text and context is the source of the interpretive ambiguity that frustrates the goals of certainty and finality underlying the use of release agreements.

There has been relatively little academic discussion on the interpretive issues associated with the release of unknown claims.[5] However, it is evident that this

4. Like in all contracts, the parties drafting a release agreement are confronted with the familiar trade-off between ex ante specification costs and ex post litigation costs. However, in the specific case of parties releasing *unanticipated* claims, the structure of the trade-off changes, as the choice of ex ante specificity is not available with respect to unknown claims. Parties who prefer ex ante specification of the contractual allocation of risk must actually introduce *broader* (less specific) contractual language to cover all the unknown claims, yet broader language results in greater indeterminacy in the matter of the release, which ultimately undermines the goal of finality.

5. See Cass, *supra* note 2 at 93; Bradford P Anderson, "Please Release Me, Let Me Go!—Releases of Unknown Claims in the Penumbra of California Civil Code Section 1542" (2008) 9:1 UC Davis Bus LJ 1; Geoff R Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis, 2020) at 286–92; Derek Whayman, "The Modern Rule of Releases" (2021) 41:3 LS 493.

issue poses difficult challenges to courts that determine the scope of releases. In Canadian case law, uncertainty persists over the effect of general releases on unknown claims. Historically, Canadian courts have relied on the rule set out in *London and South Western Railway Company v Blackmore* (*London*) (the Blackmore Rule), which limits the scope of a general release "to those things which were specifically in the contemplation of the parties at the time the release was given".[6] Recently, in *Corner Brook (City) v Bailey* (*Corner Brook*), the Supreme Court of Canada clarified that the Blackmore Rule had been "subsumed entirely"[7] into the general principles of interpretation outlined in *Sattva Capital Corp v Creston Moly Corp* (*Sattva*).[8] According to these principles, courts must "give the words [used in a contract] their ordinary and grammatical meaning, in a way that is consistent with the surrounding circumstances known to the parties at the time of contract formation".[9] The *Sattva* principles of contractual interpretation are consistent with the historical Blackmore Rule. *Sattva* and *Corner Brook* both mandate that judges adopt a contextualist interpretive approach to releases. In addition, *Corner Brook* suggests language parties could implement to reduce uncertainty over the scope of release and to clarify the relationship between text and context. The Supreme Court of Canada states that "releases that are narrowed to a particular *time frame* or s*ubject matter* are less likely to give rise to tension between the words and what the surrounding circumstances indicate the parties objectively intended".[10]

Despite these useful clarifications, a significant degree of uncertainty remains regarding the effect of broadly worded releases on claims unforeseen by the parties at the time the release is executed. The tension between text and context, which typically arises in connection with the release of unknown claims, is not solved merely by invoking the *Sattva* principles, as their application is riddled with delicate questions that are difficult to resolve. First, the interpreter must identify the relevant elements of the factual matrix.[11] This exercise alone raises

6. (1870), LR 4 HL 610 at para 623 [*London*].

7. 2021 SCC 29 at para 33 [*Corner Brook*].

8. 2014 SCC 53 [*Sattva*].

9. *Ibid* at para 47.

10. *Corner Brook*, *supra* note 7 at para 41 [emphasis added].

11. The factual matrix includes the set of circumstances that was or *reasonably* ought to have been within the common knowledge of the parties at the time of execution of the contract. See *Sattva*, *supra* note 8 at para 58.

difficult issues concerning the admissibility of contextual evidence.[12] Second, once the admissible contextual evidence has been identified, the interpreter must assess its evidentiary significance to ascertain the objective intent of the parties. Finally, ambiguity remains regarding the language parties should use to reduce uncertainty surrounding the interpretation of release with respect to unknown claims.

This paper aims to shed light on the interpretive challenges associated with a general release of unknown claims. It has three objectives. Part I is descriptive. It examines the relevant case law concerning judicial enforcement of general releases involving unknown claims and illustrates the tension between text and context that often arises when interpreting general releases. The analysis of the case law shows that, whether they interpret releases broadly or narrowly, courts regularly apply the same conceptual framework grounded in objective contractual interpretation. Consistent with *Sattva*, courts affirm that the goal of contractual interpretation is to ascertain the objective intentions of the parties at the time of contract formation. At the same time, they state that the scope of the release is limited to the concerns contemplated by the parties at the time of the execution of the release, while also asserting that a sufficiently broadly worded release can cover claims unknown to the parties at the time the release is given.

Part II is critical. It contends that the above-mentioned principles confusingly characterize the judicial task, as they overlap the objective notion of intention with the often unclear notion of what the parties contemplated. The unclear relationship between the two is at the root of the legal uncertainty surrounding the determination of the scope of the release. I identify three unresolved questions concerning the interpretation of general releases: (1) What inferences should the judge draw from the contextual evidence regarding the claims intended to be released compared to the claims that fall within the specific contemplation of the parties at the time the release is given?; (2) What language should the parties use to include unknown claims in the scope of a release?; and (3) Which factual and legal elements satisfy the idea that a claim is unknown to the parties?

12. For example, in *Corner Brook*, *supra* note 7, the Supreme Court of Canada mentions the unresolved issue of whether prior negotiations between parties are admissible when interpreting a contract (paras 56–57). On the judicial tasks involved in determining the elements of the factual matrix, see Daniele Bertolini, "Unmixing the Mixed Questions: A Framework for Distinguishing Between Questions of Fact and Questions of Law in Contractual Interpretation" (2019) 52:2 UBC L Rev 345 at 414–17.

Part III is normative. It suggests that courts could incrementally improve legal certainty by applying three interpretive principles that would more coherently resolve the issues mentioned above. First, judges should anchor their determination of the scope of release to the principle of the discoverability of claims. The principle of discoverability is borrowed from the interpretation of limitation periods. Canadian courts use the principle of discoverability to construe the time from which the limitation period runs.[13] I argue that there is a conceptual similarity between establishing when the limitation runs and determining whether a claim is intended to be released. In both cases, the judge must determine the moment at which a claimant can be deemed to have acquired knowledge of a right of action and is therefore responsible for a failure to take action.[14] As such, I propose using the principle of discoverability as a default rule for deciding whether a claim is covered by a general release. Courts should presume that generally worded releases are objectively intended to release all claims that are discoverable with reasonable diligence by the parties at the time the release was executed. Second, courts should allocate the burden of clarifying the scope of the release more clearly. The plaintiff-releasor advancing an unanticipated claim should bear the burden of proving that at the relevant time, they could not, with reasonable diligence, have acquired knowledge of the claim. Third, judges should establish that the plaintiff's knowledge of a claim is evidenced by their knowledge of the constitutive elements of a claim, such as injury, loss, or damage, causal connection with the act or omission of the person against whom the claim is made, and the proceeding functioning as an appropriate means to seek remedy. Courts' adoption of these three principles would improve the goals of legal certainty and efficiency that underlie the law of release.

13. See *Kamloops v Nielsen*, [1984] 2 SCR 2 at 40–42, 10 DLR (4th) 641; *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at 224, 31 DLR (4th) 481.

14. The consequence of failure to take action on a claim is the end of the limitation period, after which a claim cannot be pursued. For releases, if the judge determines that the claim was intended to be released at the time of the execution of the release, then the consequence of the failure to take action by the releasor (either by advancing the claim at the relevant time or by negotiating its exclusion from the scope of the release) is the preclusion of the release.

I. Case Law

A. The Blackmore Rule

The House of Lords' decision in *London*[15] is the seminal decision on the proper approach to the interpretation of releases. Lord Westbury held:

> The 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.[16]

Historically, Canadian courts of appeal have relied on the Blackmore Rule to consider a broad range of contextual evidence to ascertain what the parties contemplated at the time the release was given. In a widely cited passage in *White v Central Trust Co* (*White*), La Forest JA stated that when determining what was in the contemplation of the releasing parties, judges should consider the circumstances surrounding the signing:

> [T]he 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.[17]

15. See *London*, *supra* note 6 at para 623–624.

16. *Ibid*.

17. (1984), 7 DLR (4th) 236, 54 NBR (2d) 293 at 248 [*White*] [emphasis added]. *White* has been cited by the Supreme Court of Canada with approval in *Hill*, *supra* note 3 at para 78, as well as by the British Columbia Court of Appeal in *Hannan v Methanex Corp*, [1998] 7 WWR 619 at para 39, 46 BCLR (3d) 230, and *Kaiser*, *supra* note 3 at para 18.

In addition, Canadian courts often cite with approval the summary of the rules governing the interpretation of a release outlined in *Chitty on Contracts*.[18] The following two principles stated in *Chitty on Contracts* are especially relevant to the issue of the release of unknown claims:

> 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.
>
> 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.[19]

Canadian courts' application of the Blackmore Rule has generated uncertainty regarding whether the general language used in broadly worded releases is objectively intended to cover claims that were unknown or unanticipated by the parties at the time of the execution of the release. On a few occasions, courts have interpreted broadly worded releases *narrowly*,[20] thereby allowing unanticipated claims. In other cases, courts have interpreted general releases *broadly*,[21] thereby barring unanticipated or unknown claims. A brief analysis of the reasoning adopted by courts in reaching these divergent outcomes helps illustrate the issues associated with the release of unknown claims.

B. Decisions Interpreting Releases Narrowly

1. Words as a Factor Limiting the Scope of the Release

The courts' narrow interpretative approach to releases relies on the proposition that the words of the release cannot be construed as applying to

18. HG Beale et al. *Chitty on Contracts*, 33rd ed (London, UK: Sweet & Maxwell, 2018) vol 1 [emphasis added]. In *Kaiser*, *supra* note 3 at para 17, the BCCA cites *Chitty on Contracts* with approval.

19. *Kaiser*, *supra* note 3 at para 17.

20. See *Privest*, *supra* note 3; *IAP Claimant*, *supra* note 3; *Hill*, *supra* note 3; *Ali*, *supra* note 3; *Strata*, *supra* note 3.

21. See *Irwin*, *supra* note 3; *Kaiser*, *supra* note 3; *Biancaniello*, *supra* note 3.

claims not known to the parties at the time that it was executed. In these cases, judges assert that the words of the release are clear and specific enough to conclude that the parties did not intend to release unknown claims. Therefore, next they examine the surrounding circumstances in a way that allows them to reinforce this textual interpretation. When considering the context in which the release was executed, courts assess the elements contemplated by the parties at the time the release was executed.

For example, in *Privest Properties Ltd v Foundation Co of Canada* (*Privest*), the British Columbia Court of Appeal applied the Blackmore Rule to read a release narrowly and held that the release did not apply to all potential future litigation.[22] A dispute arose regarding a claim for federal sales tax rebates under a construction contract. In settling the dispute, the parties executed a general release agreement with respect to all claims arising under a construction contract "to the date of these presents."[23] Subsequently, the plaintiffs-releasors brought new claims related to the defendant's use of asbestos-containing products on the project. The Court applied the second part of the Blackmore Rule: "[A] question which had not at all arisen, could not be considered as bound and concluded by the anticipatory words of a general release."[24] When applying this rule, the Court took two steps. First, it examined the words of the agreement and argued that "by inserting the words 'from the beginning of the construction to the date of these presents'",[25] the parties manifested the intention that "claims which later came to their knowledge would be excluded".[26] Had the parties intended to exclude future unknown claims, they could have done so by using "more expansive wording, such as 'all claims and demands howsoever and whensoever arising, whether known or unknown, which each may have now or hereafter against the other'".[27] Second, the Court explained that even if the releasor had known that asbestos was used in the construction, this element could not support the conclusion that the claim in question was within the releasor's contemplation at the time the release was given.[28]

22. See *Privest*, *supra* note 3.

23. *Ibid* at para 5.

24. *Ibid* at para 4, citing *London*, *supra* note 6 at 720.

25. *Privest*, *supra* note 3 at para 13.

26. *Ibid*.

27. *Ibid*.

28. See *ibid* at para 14.

The Court's reasoning in *Privest* suggests that the releasor's knowledge of a *fact* underlying a future claim at the time of execution of the release does not justify the *inference* that the releasor considered the claim. The Court stated:

> Even accepting that finding [that the plaintiffs knew or should have known that the material used in the construction contained asbestos], it is a very large leap to the inference that the plaintiffs . . . were at the time the Agreement was executed, contemplating anything beyond claims of the kind referred to in the recitals . . . In absence of any authority that requires such an inference, it is not one we would make. Overall, then, we do not find that the parties were "really contracting about" a claim of the kind that forms the subject-matter of this action.[29]

The Ontario Court of Appeal in *IAP Claimant H-15019 v Wallbridge* (*IAP Claimant*) recently adopted a similar approach.[30] The plaintiff was a member of an Indian residential school survivors' class action suit that was settled by the Indian Residential Schools Settlement Agreement (IRSSA). The IRSSA established an alternative adjudicative process—the Independent Assessment Process (IAP)—to address claims of abuse suffered by class members. The plaintiff retained the defendants to bring an IAP claim on his behalf. The claim was initially dismissed, as the plaintiff's evidence was insufficient to meet the IAP's burden of proof.[31] The plaintiff sued his lawyers and the Attorney General of Canada (Canada) for breach of fiduciary duty and negligence associated with the dismissal of his initial IAP claim. In particular, the plaintiff's action alleged breaches of Canada's obligations under the IRSSA to disclose documents and compile reports prior to his initial IAP hearing. The IRSSA contained a broad and general release in favour of the defendants that expressly included future damages. The defendants-releasees took the position that the plaintiff's action was barred by this release.

The Court of Appeal for Ontario applied the second part of the Blackmore Rule and held that the release did not cover causes of action arising in the future. Similar to the British Columbia Court of Appeal in *Privest*, the Court

29. *Ibid*.

30. *IAP Claimant*, *supra* note 3.

31. See *ibid* at para 3.

begins by examining the words of the release and noting that, while they reference future damages, they do not mention future causes of action.[32] The differing treatment between damages and cause of action suggests that the release did not cover claims for *factual* situations that had not yet occurred at the time the IRSSA was executed. As the plaintiff-releasor's claim was based on material facts—Canada's alleged failure to satisfy its disclosure obligations under the IRSSA—that occurred after the release was executed, it was not encompassed by the release.

Additionally, the Court considered the context in which the release was given and provided further evidence as to why it had not been the intention of the parties to release Canada from its obligations under the IRSSA. The Court argued that it could not have been within the reasonable contemplation of the parties that the class members (the releasors) release Canada (the releasee) from disclosure obligations that the same agreement imposes on Canada.[33] The Court emphasized that release included claims "arising directly or indirectly . . . in relation to . . . the operation generally of Indian Residential Schools",[34] while the plaintiff sought damages "for psychological harm suffered . . . as a result of Canada's alleged failure to satisfy its disclosure obligations under the IRSSA".[35] This indicated that the parties could not have intended to release Canada from the obligations it assumed under the IRSSA.[36]

In both *Privest* and *IAP Claimant*, the argumentative structure of the decision relies on a consideration of both the text of the release and the context in which the release was executed. When considering the context, the courts examine the elements in the specific contemplation of the parties and draw inferences from these elements as to what claims were intended to be released. Two significant differences are worth noting. First, in *Privest*, the Court understands the "contemplation" requirement subjectively, as requiring judges to ascertain what the parties were "really contracting about",[37] while in *IAP Claimant*, the Court adopts an objective understanding of the requirement, intended as referring to what parties under those circumstances can reasonably be envisioned to have released.[38] Second, while in *Privest* the plaintiff's claim was partially based on a factual element that was known or should have been known by the releasor at the time the release was executed (the presence of

32. See *ibid* at para 15.

33. See *ibid* at para 35.

34. *Ibid*.

35. *Ibid*.

36. See *ibid* at para 32 (referring to motion judge at para 22).

37. *Privest*, *supra* note 3 at para 14.

38. See *IAP Claimant*, *supra* note 3 at para 36.

asbestos in the construction material),[39] in *IAP Claimant* the plaintiff's claim was based on facts that were unknown, as they had not yet occurred at the time the release was executed (Canada's alleged failure to satisfy its disclosure obligations).[40]

2. The Transactional Context as a Factor Limiting the Scope of the Release

In the previously examined cases, the courts highlighted the legal significance of the specific words of the release. However, the broad language of a release often fails to reveal what the parties contemplated at the time of its execution. Courts deal with indeterminate contract text by inferring factors that limit the broad language of the release from the transactional context in which the release was given. For example, in the Supreme Court of Canada case *Hill v Nova Scotia (Attorney General)* (*Hill*), Nova Scotia expropriated land for the construction of a highway and reached an agreement with the landowner regarding compensation.[41] The agreement established that the landowner would acquire an interest in the highway, providing him with a right of way. A dispute arose when the Crown denied the creation of an interest in the land. The Supreme Court of Canada had to determine whether the applicable release stood as a bar to recovery. The Court applied the Blackmore Rule, arguing that because the release was signed "in the context of the expropriation proceedings it [was] clear that an essential and integral element of the consideration [was] the equitable interest in land".[42] For this reason, the release could not constitute a bar to the landowner's claim for compensation for taking their equitable interest in the land.

The limiting function of the context is frequently seen in releases given as part of dispute settlements. Canadian courts adopt the approach illustrated by the House of Lords in *Bank of Credit and Commerce International SA v Munawar Ali* (*Ali*).[43] When a release is given in the context of settling a dispute, the judge can infer that the parties intended to include in the scope of the release those claims that arise from the dispute. In S*trata Plan BCS 327 v Ipex Inc* (*Strata*), the British Columbia Court of Appeal applied *Ali* to a release executed to settle a dispute concerning damages resulting from water leaks in the sprinkler system

39. See *Privest*, *supra* note 3 at para 5.

40. See *IAP Claimant*, *supra* note 3 at paras 4, 35.

41. *Hill*, *supra* note 3.

42. *Ibid* at 78–79 (the Supreme Court of Canada Court cited with approval the dicta of LaForest J in *White*).

43. *Ali*, *supra* note 3.

of a residential condominium.[44] The statement of claim referenced water damage caused by a number of sprinkler pipe bursts that occurred in several condominium units at specific moments in time.[45] The release discharged the manufacturer of the sprinkler pipe "from any and all actions, causes of action, claims, [and] suits . . . whether known or unknown" related to the matters at issue in the statement of claim, identified by case number.[46] After signing the release, other leaks were identified, and the parties disagreed as to whether the release barred the owner from pursuing additional claims for damages incurred after the settlement. The Court found that the limited scope of the statement of claim and the correspondence between the parties demonstrated that the release was intended to apply to the damage caused by the specified events and "was not intended to apply forever forward".[47] The Court emphasized that the correspondence between the parties' counsels "formed most of the context of the settlement"[48] and showed that the objective intention of the release was to apply only to the damage described in the statement of claim. Thus, the attribution of legal significance to the communication of the parties during settlement negotiations was decisive in limiting the broad language of the release.

C. Decisions Interpreting Releases Broadly

1. Releases Expressly Including Unknown Claims

In a few cases, the application of the Blackmore Rule has led courts to preclude the releasor from taking action on unknown claims against the releasee. Decisions barring unknown claims have generally relied on two interpretive steps. First, the court determines whether the language of the release evinces the parties' intention to cover unknown claims. Courts have traditionally held that parties wanting to bar unknown claims must express that intention through clear and unequivocal language.[49] Second, if the language of the release covers unknown claims, the court decides whether the unknown claim is part of the subject matter of the release. If found to be part of the subject matter of the

44. *Strata*, *supra* note 3 at para 26. See also *ibid*, at paras 21–23, 25 for the Court's references to the Blackmore Rule, La Forest JA's comments in *White*, *supra* note 17, and *Privest*, *supra* note 3.

45. See *Strata*, *supra* note 3 at para 31.

46. *Ibid* at para 5.

47. *Ibid* at para 37.

48. *Ibid* at para 38.

49. See *York University v Markicevic*, 2013 ONSC 378 at paras 48, 52 [*York*], quoting Geoff

release, the releasor cannot sue on that claim, even if it was unknown at the time the release was made.

This approach is exemplified by the decision in *Bank of Montreal v Irwin* (*Irwin*),[50] in which the British Columbia Court of Appeal considered a general release of claims "known or unknown, suspected or unsuspected".[51] The release involved debt Mrs. Irwin owed to a bank. The legal issue was whether the release signed by the bank barred the bank's action against Ms. Irwin, which was based on the allegation that she was hiding her husband's assets. The bank argued that the release only referred to claims in existence at the time of its execution, while its claim in the action could only have arisen after Mr. Irwin's assignment in bankruptcy. The Court first examined the language of the release, arguing: "[T]he narrow construction of the clause, as proposed by the Bank, is inappropriate in light of the circumstances surrounding the making of the Release and its essential nature."[52] The Court found, "[b]ankruptcy as a realistic possibility must have occurred to the Bank when it released Mrs. Irwin . . . it follows that [the bank] was aware then that in the event of bankruptcy it would be a creditor."[53] Second, the Court explored whether the claim was part of the subject matter of the release, which expressly covered all claims "arising from or incidental to or for any reason arising in connection with" the debt.[54] The Court found that "at the heart of this suit is the same debt of Mr. Irwin to the Bank which is detailed in the Release"; therefore, the claim was barred by the release.[55]

2. Releases Implicitly Including Unknown Claims

In *Irwin*, the language of the release expressly covers unknown claims. However, in other cases, courts have precluded unknown claims, despite the fact that the releasing instrument did not explicitly discharge such claims. In *Bank of British Columbia Pension Plan v Kaiser* (*Kaiser*), the pension plan of the respondent-releasee bank was being wound up and distributed to its

R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Toronto: LexisNexis, 2012), s 7.10.1; *London*, *supra* note 6, cited with approval in *R v Imperial Tobacco Canada*, 2012 ONSC 6027 at para 26; *Gwininitxw v British Columbia (Attorney General)* 2013 BCSC 1972 at para 25 [*Gwininitxw*].

50. See *Irwin*, *supra* note 3.

51. *Ibid* at para 23 [emphasis added].

52. *Ibid* at para 25.

53. *Ibid* at para 26.

54. *Ibid* at para 29.

55. *Ibid*.

members. Kaiser, the appellant-releasor and former CEO of the bank, had signed a release related to the pension plan after his departure from the bank.[56] The release stated that he would accept the agreed-upon sum "in full settlement of salary . . . and all other payments or benefits due or accruing due under any agreement or any arrangement with the Bank".[57] Kaiser claimed that when he waived his pension rights, he only intended to waive the supplementary retirement income pension plan, not the regular staff pension plan. The British Columbia Court of Appeal referred to the interpretative approach set out in *Chitty on Contracts*, including the principle that a release cannot be construed to apply to facts of which the releasor had no knowledge when they signed it.[58]

There was no evidence that, at the time of the sign of the release, the parties specifically contemplated the appellant's entitlement to the pension plan. Nevertheless, the Court found that "the release and settlement signed by the appellant applied not only to his salary but to any agreement or arrangement with the Bank, and that the regular Staff Pension Plan was such an agreement or arrangement."[59] Justice Ryan, writing for the unanimous Court emphasized the relevance of the surrounding circumstances when interpreting the language of the release, which was concluded against a background of financial difficulty and shareholder discontent. He stated:

> Reading the release as a whole, in the context of the surrounding circumstances . . . it seems clear that the parties intended to completely sever their relationship. To achieve this the appellant accepted a sum of money to replace salary and other benefits associated with his work at the Bank due or accruing to him *in the future*.[60]

Justice Ryan determined that the "release permitted the appellant 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."[61] He concluded that the release covered the pension plan.[62]

In *Biancaniello v DMCT LLP* (*Biancaniello*), the Ontario Court of Appeal further extended the parties' ability to release unknown claims.[63] The dispute

56. *Kaiser*, *supra* note 3.

57. *Ibid* at paras 11, 23.

58. See *ibid* at para 17.

59. *Ibid* at para 26.

60. *Ibid* at para 23 [emphasis added].

61. *Ibid* at para 25.

62. See *ibid* at para 37.

63. See *Biancaniello*, *supra* note 3.

arose out of a release agreement signed by an accounting firm and one of its clients, Biancaniello, to settle a legal dispute concerning unpaid legal fees. The release did not specifically include unknown claims. Instead, it encompassed all claims arising from professional services rendered by the accountants during a specified period of time. A few years after signing, the client discovered that the firm had provided negligent advice during the time period covered by the release and sued, seeking to set aside the release and recover damages suffered as a consequence of professional negligence. The firm moved for summary judgment to dismiss the client's action on the basis that the claim was barred by the release.

The issue was whether the release applied to the unanticipated claim. Both the motion judge and the divisional court ruled in favour of Biancaniello, finding that the general wording of the release could not bar a claim the parties did not know existed.[64] The Ontario Court of Appeal overturned the lower courts' decisions and dismissed the client's claim. Justice Feldman, writing on behalf of a unanimous Court, outlined three steps supporting her conclusion that unknown claims were included in the scope of the release. First, she found that the claim advanced by the releasor fell clearly within the language of the agreement. The judge noted that the release included "claims made in the fees litigation, as well as all defences or counterclaims that were pleaded or could have been pleaded".[65] Therefore, because negligent provision of services would have been a viable defence or counterclaim during fees litigation, the claim for negligence was included in the scope of the release and "*there [was] no need to search for what was contemplated by the parties.* It [was] spelled out specifically and clearly."[66]

Second, she asserted that all known and unknown claims arising from the services provided were included in the scope of the release, *unless specifically excluded*.[67] In reaching this conclusion, Feldman JA rejected the releasor's argument that because the claim was unknown and the agreement did not expressly cover unknown claims, the claim was not included in the scope of the release.[68] On the contrary, she argued, "[b]y 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."[69] Therefore, unknown claims fall within the general category

64. See *Biancaniello v DMCT LLP*, 2015 ONSC 6361.

65. *Biancaniello*, *supra* note 3 at para 45.

66. *Ibid* at para 46 [emphasis added].

67. See *ibid* at para 49.

68. See *ibid* at paras 47–48.

69. *Ibid* at para 49.

of "all claims", unless they are specifically excluded.[70] In the Court's view, "the language used by the parties . . . was clear and unequivocal in its intent and effect"[71] of barring all (known and unknown) claims included in the subject matter of the release: "Had the client wished to exclude claims it might later discover arising from that work, it could have bargained for that result."[72]

Third, Feldman JA expressly rejected the Divisional Court's argument that, because the parties were not aware that the accountants had given negligent advice, the claim for negligence did not exist at the time the release was signed. The Court argued that "the fact that the claim was not discovered does not mean that it did not exist . . . In fact, it did exist, but came to light only upon being discovered by other accountants four years later."[73] The Court concluded that the release agreement was to be interpreted as covering claims that—albeit *unknown* to and unanticipated by the parties—*existed* at the time the release was signed.[74]

D. Corner Brook v Bailey

A brief analysis of the Supreme Court of Canada's decision in *Corner Brook*,[75] together with the lower courts' judgments, aids us in appreciating courts' competing understandings of the requirements of the common law of release of unknown claims. The dispute arises out of a release agreement between Mrs. Bailey and the City of Corner Brook (City). Years before the dispute, Mrs. Bailey struck Mr. Temple, an employee of the City, while driving a car. Mr. Temple sued Mrs. Bailey, seeking compensation for the injuries he had sustained in the accident ("Temple Action"). In a separate action, Mrs. Bailey sued the City for alleged property damage to the car and physical injury she suffered in the accident ("Bailey Action"). Mrs. Bailey and the City settled, and Mrs. Bailey released the City from liability relating to the accident. At the time of the execution of the release, Mrs. Bailey had been served with the statement of claim in the Temple Action, while the City was not aware of that action. The release included the following language that expressly releases the City from unknown claims:

> [T]he [Baileys] . . . hereby release and forever discharge the [City] . . . from all actions, suits, causes of action . . . claims

70. See *ibid*.

71. *Ibid* at para 50.

72. *Ibid* at para 51.

73. *Ibid* at para 52.

74. See *ibid*.

75. See *Corner Brook*, *supra* note 7.

> and demands whatsoever, including all claims . . . past, present or future . . . *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 . . . without limiting the generality of the foregoing from all claims raised or which could have been raised in the [Bailey Action].[76]

Years later, in the action brought against her by Mr. Temple, Mrs. Bailey commenced a third-party claim against the City, seeking contribution or indemnity from the City should she be found liable to Mr. Temple. The City argued that the third-party claim was precluded by the release. Mrs. Bailey countered that it was not precluded, as it was not specifically considered by the parties at the time of the execution of the release.

The Supreme Court of Newfoundland and Labrador ruled in favour of the City, finding that Mrts. Bailey's third-party claim was barred by the release.[77] Justice Murphy found that the broad language of the contract "indicates that the release was intended to cover all claims which Mrs. Bailey might have against the City",[78] including the third-party indemnity claim.[79] The Court of Appeal of Newfoundland overturned the judge's decision.[80] Justice Butler found that the words, the context, and the exchange of correspondence between the parties were all consistent with the inclusion in the scope of the release of the first-party claim (the Bailey Action) against the City, but not the third-party claim.[81] The divergence between the trial judge and the appellate courts concerned mostly the identification of which factual conditions satisfied the *contemplation* requirement and, relatedly, what inferences should be drawn from the contextual evidence to determine the intention of the releasing parties. It is undisputed that, at the time the release was signed, the releasor was aware of the third-party action against her, but there was no evidence that the releasee was aware of that action. Therefore, it could not be said that the City specifically contemplated the possibility of being exposed to a third-party claim by Mrs. Bailey. Nevertheless, the trial judge concluded that the parties believed the

76. *Ibid* at para 7 [emphasis added].

77. See *Temple v Bailey*, 2018 NLSC 177 [*Temple* NLSC].

78. *Ibid* at para 22.

79. See *ibid*.

80. See *Bailey v Temple*, 2020 NLCA 3 [*Temple* NLCA].

81. See *ibid* at para 71.

release would include *any* and *all* claims and demands the releasor could bring against the releasee as a result of the accident.[82] In contrast, the appellate court argued that because it was not possible to prove that the third-party action was within the contemplation of both parties, the release could not be interpreted as including a third-party claim brought by the releasor.[83]

The Supreme Court of Canada held that the broad wording of the release was objectively intended to capture *any* claim relating to the accident against the City.[84] Justice Rowe, writing for the unanimous court, emphasized,

> Both the City and Mrs. Bailey knew, or ought to have known on an objective basis, that [Mr. Temple] may have an outstanding claim against Mrs. Bailey, or the City, or both, and that such a claim could put the City and Mrs. Bailey in an adverse position to one another, where it would be to both of their advantages to blame the damage on the other.[85]

According to the Court, "[t]his aspect of the factual matrix weighs in favour of interpreting the words of the release as including Mrs. Bailey's third party claim in the Temple Action."[86]

Justice Rowe provided three crucial clarifications. First, there is no special interpretative rule that applies to releases. The reading of a release is subject to the general principles of contractual interpretation established in *Sattva*.[87] The Blackmore Rule is subsumed entirely by the approach set out in *Sattva* and should no longer be referred to as the principle formally governing the interpretation of releases.[88] At the same time, however, the Court stated that "the way the Blackmore Rule is formulated and applied [by Canadian courts] reveals no inconsistency with the general principles of contractual interpretation".[89] Second, a sufficiently broadly worded release can cover unknown claims, "and does not necessarily need to particularize with precision

82. See *Temple* NLSC, *supra* note 77 at paras 43–45.

83. See *Temple* NLCA, *supra* note 80 at para 71.

84. See *Corner Brook*, *supra* note 7.

85. *Ibid* at para 53.

86. *Ibid*.

87. See *ibid* at paras 33–34, 43. When interpreting a contract, courts must "giv[e] the words used [in the contract] their ordinary and grammatical meaning, in a way that is consistent with the surrounding circumstances known to the parties at the time of [formation of the contract]". See *Sattva*, *supra* note 8 at para 47.

88. See *Corner Brook*, *supra* note 7 at paras 23, 33.

89. *Ibid* at para 30.

the exact claims that fall within its scope".[90] The issue of whether a release includes unknown claims must be decided on a case-by-case basis by interpreting the contractual language in light of the factual matrix.[91] Finally, Rowe J offered suggestions regarding the type of language parties could use to reduce uncertainty over the scope of release, noting, "releases that are narrowed to a particular *time frame* or *subject matter* are less likely to give rise to tension between the words and what the surrounding circumstances indicate the parties objectively intended."[92]

Despite efforts to resolve the legal uncertainty surrounding the release of unknown claims, *Corner Brook* further highlights the unresolved tension between text and context where parties who have signed a general release are not aware of all the rights that such expansively worded agreements are objectively intended to relinquish.

II. Sources of Legal Uncertainty

This cursory overview of Canadian case law demonstrates that Canadian courts adhere to the following principles, regardless of whether they interpret releases broadly or narrowly:

1. The goal of contractual interpretation is to ascertain the objective *intention* of the parties at the time of contract formation;[93]
2. The scope of the release is limited to what was *in the contemplation of the parties* when the release is given;[94]
3. To determine the objective intention of the parties and the issues within their specific contemplation, courts should consider the *language* of the release in light of the *surrounding circumstances*;[95] and
4. A sufficiently broadly worded release can cover claims *unknown* to the parties at the time the release is given.[96]

90. *Ibid* at para 27.

91. See *ibid* at para 43.

92. *Ibid* at para 41.

93. See *Sattva*, *supra* note 8 at paras 47–48 (this passage is cited favourably in *Corner Brook*, *supra* note 7 at para 35).

94. See *White*, *supra* note 17.

95. See *Corner Brook*, *supra* note 7 at para 43.

96. See *ibid* at para 27.

Despite the courts' emphasis on these commonly agreed-upon principles, it remains difficult for private parties to anticipate the outcome of decisions concerning the effects of generally worded releases in claims unanticipated by the parties at the time of the release. Specifically, three issues cause the majority of legal uncertainty concerning the scope of the release:

1. The inferences the judge must draw from evidence of the surrounding circumstances to identify the claims that are within the specific *contemplation* of the parties and are *intended* to be released at the time the release is given;
2. The language parties should use to include unknown claims in the scope of a release;
3. The factual and legal elements that satisfy the concept of a claim being *unknown* to the parties, when releases that do not explicitly include unknown claims.

A. The Ambiguity of the Contemplation-Intention Nexus

The case law is unclear on the meaning of "what is within the specific contemplation of the parties" and how this element contributes to the ascertainment of the parties' objective intention. In some cases, courts hold that the parties' claim is within the contemplation of the parties if actual intention of releasing these claims is made explicit in the words of the releasing instrument or is *directly* shown by evidence of the surrounding circumstances. In this view, the contemplation requirement delimits the scope of what is intended to be released by barring claims that were not subjectively contemplated by the parties at the time the release was signed. For example, as previously noted, in *Privest* the Court understands the "contemplation" requirement as requiring judges to ascertain what the parties were "really contracting about",[97] and refuses to infer that the plaintiff was "contemplating anything beyond claims of the kind referred to in the recital".[98]

By contrast, in other cases, courts understand the contemplation requirement as referring to what parties can *reasonably* be envisioned to have released under the circumstances surrounding the conclusion of the agreement. On this view, the contemplation requirement is synonymous with what the parties mutually and objectively intended. For example, in *Biancaniello*, the Court found that there was no need to search for what was contemplated by the parties: since the

97. *Privest*, *supra* note 3 at para 14.

98. *Ibid*.

unknown claim in negligence fell within the subject matter of the release, the Court held that the release was within the parties' contemplation.[99]

These different understandings of the contemplation requirement characterize the lower courts' decisions in *Corner Brook* as well. As noted earlier, the trial judge included within the scope of the release a question that had not yet arisen at the time the release was signed (a third-party claim against the releasor) and that could not therefore be within the releasor's subjective contemplation.[100] By contrast, the appellate court emphasized that, since this issue could not be within the specific contemplation of the parties, it could not be included within the scope of the release.[101] The Supreme Court of Canada acknowledged this lack of clarity by stating that "it is not immediately obvious what 'specially in the contemplation of the parties' means".[102]

I contend that providing greater conceptual clarity to the relationship between intention and contemplation may contribute to attaining greater predictability in the application of the law of release. It is useful to emphasize that the intention and contemplation requirements have different historical origins and conceptual bases.[103] Whayman usefully observes that the contemplation requirement comes "from a line of equitable cases for rescission for mistake as to what was being released based on the subjective knowledge of the mistaken party".[104] In this historical context, what the parties "contemplated" is associated with what the parties *subjectively* knew they were releasing at the time they signed the release document. By way of contrast, the intention requirement "is of common law origin"[105] and has "developed independently"[106] from the contemplation requirement. In this latter legal context, the parties' *intention* encompasses what the parties consented to release by signing, based on an *objective* interpretation of the release document. Subsequently, the modern law of releases has resulted from a historical process in which the two distinct requirements of contemplation and intention "somewhat surprisingly, were

99. See *Biancaniello*, *supra* note 3 at para 46.

100. See *Temple* NLSC, *supra* note 77 at paras 43–45.

101. See *Temple* NLCA, *supra* note 80 at para 71.

102. *Corner Brook*, *supra* note 7 at para 25.

103. For an illuminating analysis of the historical development of the intention and contemplation requirements of the modern law of release, see Whayman, *supra* note 5.

104. *Ibid* at 494.

105. *Ibid*.

106. *Ibid*.

mixed together in the courts of common law".[107] The combination of these two distinct legal requirements in a unified legal regime requires clarification of how they can be coherently understood and applied.

1. The Contemplation Requirement Understood Objectively

From a conceptual standpoint, two alternative accounts of the relationship between intention and contemplation could hypothetically be conceived. One conceptualizes contemplation subjectively, as a *substantive* requirement for the preclusive effect of the release. What the parties subjectively contemplate is determinative of mutual intent. Under this framework, the scope of general releases is limited to what is subjectively contemplated, based on the assumption that one cannot intentionally release what one does not contemplate. However, this understanding of the contemplation-intention nexus would not fit into the doctrinal framework of objective contractual interpretation currently adopted by Canadian courts. Indeed, it is a well-established legal principle that the contemplation requirement does not permit judges to consider the subjective intention of the parties.[108] Furthermore, after *Sattva*, it is undisputed that contextual evidence must be considered to determine the intention of the parties. Absent objective contextual evidence of the parties' intention to not include unknown claims, there is no basis to infer that parties drafting a generally worded release intended not to include unknown claims in the scope of the release. Evidence of a lack of subjective contemplation does not infer a lack of objective intention.

An alternative account allows the judge to consider the specific contemplation of the parties objectively, as an element of the factual matrix, indicating what the parties objectively intended to release. That is, evidence of what was within the contemplation of the parties (what the parties knew or should have reasonably known) is relevant to *proving* their objective intention, although it does not provide conclusive evidence. Under this conceptual framework, since the contemplation requirement is understood objectively, the scope of general releases may include claims that are intended to be released *even if they are not subjectively contemplated*. This account of the contemplation rule better fits within the framework of objective contractual interpretation adopted by Canadian courts.

107. *Ibid*.

108. See *White*, *supra* note 17 at 40; *Hill*, *supra* note 3 at paras 18–22; *Strata*, *supra* note 3 at paras 22–23; *Biancaniello*, *supra* note 3 at para 28; *Corner Brook*, *supra* note 7 at para 25.

In the context of the law of remoteness, Canadian courts' usage of the phrase "within the reasonable contemplation of the parties" supports the conclusion that the contemplation limb of the Blackmore Rule must be objectively understood.[109] Following the leading case *Hadley v Baxendale*, it is generally accepted that damages for breach of contract should be limited to losses that were in the reasonable contemplation of the parties when the contract was made.[110] In keeping with this traditional definition of the remoteness principle, the Supreme Court of Canada has consistently held that a consequence of breach of contract must reasonably be contemplated by the parties to merit damages.[111] The term "within the reasonable contemplation of the parties" is used objectively, not subjectively, to determine the extent of the risk that the defendant-promisor is reasonably expected to bear if he or she breaches the contract. The objective nature of the contemplation test is clarified by the Ontario Court of Appeal's decision in *Kienzle v Stringer*, in which the Court states:

> In using the terms "reasonably foreseeable" or "within the reasonable contemplation of the parties" courts are not often concerned with what the parties in fact foresaw or contemplated . . . The governing term is reasonable and what is reasonably foreseen or reasonably contemplated is a matter to be determined by a court.[112]

Furthermore, both recent English case law[113] and the scholarly literature[114] support the view that the reasonable contemplation test for the purposes of

109. I am indebted to an anonymous reviewer for prompting me to discuss the contemplation rule in light of the law of remoteness.

110. See [1854] EWHC Exch J70 (BAILII) [*Hadley*].

111. See *Honda Canada Inc v Keays*, 2008 SCC 39 at para 54; *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at paras 42, 55; *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54 at para 12.

112. (1981), 35 OR (2d) 85 at para 21, 130 DLR (3d) 272.

113. See *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*, [2008] UKHL 48.

114. See John Cartwright, "Remoteness of Damage in Contract and Tort: a Reconsideration" (1996) 55:3 Cambridge LJ 488 at 505; David Campbell & Hugh Collins, "Discovering the Implicit Dimensions of Contracts" in David Campbell, Hugh Collins & John Wightman, eds, *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Oxford, UK: Hart, 2003); Adam Kramer, "An Agreement-Centered Approach to Remoteness and Contract Damages" in Nili Cohen & Ewan McKendrick, eds, *Comparative Remedies for Breach of*

remoteness requires courts to determine whether it can reasonably be inferred that, by entering the contract, the promisor assumed responsibility for the loss suffered by the promisee. This understanding of the contemplation requirement demands that judges give effect to the allocation of risks made by the parties by taking into account the content and purpose of the contract and the surrounding circumstances, including the parties' (actual or constructive) knowledge at the time of entering the contract. The question is whether it is reasonable to infer that the promisor undertook responsibility for the loss suffered by the promisee in case of breach of contract. From this perspective, the loss cannot be considered too remote merely because it was not anticipated. It is necessary for the claimant to show that, according to the terms of the contract and the surrounding circumstances, it is appropriate to allocate the loss to the promisor.

Arguably, this perspective on damages affects the interpretation of releases, as the scope of the risk contemplated by the parties upon entering into the contract defines the outer bounds of the promisor's liability should she breach the contract. From this perspective, the process of contractual interpretation informs the allocation of legal responsibility for the loss suffered by the promisee in the event of a breach of contract. Swan, Adamski, and Na argue that determining the extent of the risk assumed by the promisor for the purposes of remoteness "is part of the ordinary process of interpretation and construction".[115] Thus, it may reasonably be argued that, with respect to the interpretation of releases, the content of the reasonable contemplation test should parallel the test that courts apply in the context of remoteness.

Following this logic in the context of interpreting releases, the contemplation rule would be concerned with identifying the claims that could reasonably be *inferred* to be part of the bargain when the release was signed. The question would be whether, in accordance with the terms of the contract and the surrounding circumstances (including what the parties knew or reasonably ought to have known when they entered the contract), it is reasonable to infer that a claim was a part of the bargain in the reasonable contemplation of the

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Contract (Portland: Hart, 2005); Donald Harris, David Campbell & Roger Halson, *Remedies in Contract and Tort*, 2nd ed (Cambridge: Cambridge University Press, 2005); Andrew Tettenborn, "*Hadley v Baxendale* Foreseeability: a Principle Beyond Its Sell-By Date?" (2007) 23:1–2 JCL 120; Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 515; Stephen M Waddams, *The Law of Contract*, 8th ed (Toronto: Thompson Reuters, 2022) at 745.

115. Swan, *supra* note 114 at 511.

parties. The defendant-releasee who argues that a claim is barred as an effect of the release should demonstrate that the relinquishment of the unknown claim was part of the agreement with the plaintiff. Conversely, a plaintiff-releasor who aims to evade the preclusive effect of the release should counterargue that, in accordance with the terms of the contract and the surrounding circumstances, she could not be said to have accepted the relinquishment of the unanticipated claim. To adjudicate the dispute, the judge should infer the parties' shared intention with respect to the release of the unknown claim.

2. The Challenges of Objectively Interpreting the Release of Unknown Claims

The preceding considerations plausibly suggest that, under the existing common law of contract, the contemplation requirement should be understood objectively as a framework for discovering the allocation of risk made by the parties at the time of the release. However, contending that the contemplation requirement demands objective consideration only gets us so far when dealing with the release of unknown claims. Inferring the allocation of risk from the terms of the contract and its factual matrix is a highly unreliable enterprise in circumstances in which, *by definition*, the parties do not anticipate the risk. According to the objective approach to contractual interpretation, the goal of interpreting contracts is to ascertain the objective intentions of the parties at the time of contract formation.[116] The Supreme Court of Canada emphasizes that, to determine the parties' intention, courts must give "the words used [in a contract] their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract".[117] However, when judges must determine whether an unanticipated claim falls within the scope of the release, they face a situation in which parties have neither expressly nor tacitly manifested a shared intention in relation to the relevant allocation of the subsequently realized risk. Claims have emerged that were unknown or not suspected by the parties. Therefore, the judge lacks any conclusive textual basis or sufficient contextual evidence to make confident inferences about the parties' objective intention. Furthermore, in many cases (as noted earlier), the apparently all-embracing scope of the words of the releasing instrument seems to be contradicted by limiting inferences that could be drawn from available contextual evidence. The Supreme Court of Canada recognizes

116. See *Sattva*, *supra* note 8 at para 55.

117. *Ibid* at para 47.

this challenge by stating that, in the case of releases of unknown claims, "the broad *wording* of releases can conflict with the *circumstances*, especially for claims not in contemplation at the time of the release".[118]

In this light, I argue that the judicial consideration of the words of the release and the surrounding circumstances constitutes an unhelpful point of reference for determining the parties' objective intention with regard to the allocation of the risk of unanticipated claims. The objective understanding of "what is in the specific contemplation of the parties" leaves unresolved the delicate question of *which inferences* about the parties' shared intention the judge is permitted to draw from the surrounding circumstances. This evidentiary difficulty is exacerbated when contextual evidence shows that a claim was not in the specific contemplation of the parties at the time the release was given. This issue is problematic because evidence of a lack of knowledge can support two opposite (yet, conceptually, equally legitimate) inferences regarding the parties' objective intentions. First, the judge could draw the conclusion that a generally worded release fails to provide evidence of the parties' objective intention to include claims that are not known at the time the release is given. The judge could plausibly argue that the releasee—the party seeking finality through the release of unknown claims—bears the onus of including explicit language covering unknown claims in the release. This inferential reasoning is consistent with the traditional principle in case law, according to which clear and unequivocal language is required to release unknown claims.[119] Second, contextual evidence showing a lack of knowledge could support the opposite conclusion: that a generally worded release is itself objective evidence of the parties' intention to release unknown claims, absent evidence from which an inference to the contrary can be made. This argument relies on the assumption that, by entering a broadly worded release, the releasor accepts the risk that further claims might emerge in the future. Therefore, the burden of negotiating for the insertion of language excluding unknown claims from the scope of a generally worded release falls on the releasor. This inferential reasoning is consistent with the Ontario Court of Appeal's holding in *Biancaniello*[120] and the Supreme Court of Canada's reasoning in *Corner Brook*.[121] In the latter, Rowe J emphasizes that the

118. *Corner Brook*, *supra* note 7 at para 38.

119. See *Ali*, *supra* note 3 at paras 9–10; *York*, *supra* note 49 at para 52; *Gwininitxw*, *supra* note 49 at para 25.

120. See *Biancaniello*, *supra* note 3.

121. See *Corner Brook*, *supra* note 7 at para 27 where the Court states: "The releasor takes on the risk of relinquishing the value of the claims he or she might have had, and the releasee pays for the guarantee that no such claims will be brought."

contemplation element does not require courts to consider the subjective knowledge of the releasor.[122] Moreover, he clarifies that the actual knowledge of the parties is a relevant element of the surrounding circumstances only when the claim is based on facts known to *both* parties.[123]

The evidentiary ambiguity of the broad language of a release suggests that the objective approach to contractual interpretation fails to provide clear guidance on the claims parties objectively intend to release when signing a generally worded release. The inference the judge draws from a generally worded releasing instrument ultimately depends on *who* is believed to hold the burden of clarifying the parties' intention. Therefore, the objective approach to interpreting generally worded releases remains equivocal unless a prior value judgment is made on who should bear the risk of unknown claims and the burden of negotiating clear language.

3. Reconceptualizing the Contemplation Requirement as a Gap-Filling Device

The preceding considerations suggest that, besides being unworkable in practice, the objective framework of contractual interpretation may inaccurately describe the kind of judicial reasoning brought to deciding whether a generally worded release precludes unanticipated claims. The lack of a factual basis for inferring the parties' intention suggests that it may be unrealistic to view courts as making a genuine effort at interpretation when determining whether claims not anticipated by the parties fall within the scope of a broadly worded release. Rather than contending that courts identify an allocation of risk that was implicitly agreed upon by the parties, a more realistic account may be that courts actually engage in a gap-filling exercise to determine how the risk of

122. See *ibid* at para 49 where the Court states:

> Mrs. Bailey's subjective knowledge . . . is irrelevant under an objective theory of contract law . . . What is privately in the mind of one party could not affect how that party's conduct would appear to a reasonable observer in the position of the other . . . [whether the releasor] had private knowledge of a claim is irrelevant in interpreting the release to determine whether or not she accidentally released that claim.

123. See *ibid* at para 43 where the Court states: "Distinctions can be drawn between claims based on facts known to both parties . . . and claims based on facts that were not known to both parties . . . Such distinctions may be relevant when interpreting a release and assessing whether the claim at issue is the kind of claim the parties mutually intended to release."

unanticipated claims should be allocated on the basis of what may *reasonably* be imposed on the releasor or the releasee. In this view, the norm governing the allocation of risk between between the releasor and the releasee would not be the parties' intention but an external standard of reasonableness determined by the judge.

I contend that conceptualizing the contemplation rule as a gap-filling device (or default rule) more accurately describes the real question that judges ask themselves (as opposed to what they claim to ask) in determining whether or not an unanticipated claim should be included in the scope of the release. In many cases, the basis for including an unknown claim within the scope of the release is not the belief that the releasor can be said to have agreed to relinquish the claim but the concern that it is fair (or appropriate) to bar the releasor from advancing claims of a kind that reasonable people would have contemplated as part of the bargain had they diligently considered the relevant types of claim when the release was signed.[124] The real basis of the decision is not an inference about the parties' shared intention but a *counterfactual* assessment of whether a reasonable person in the position of the realizing parties ought to have acquired knowledge of the circumstances creating the risk of the relevant type of claim. Stated differently, the focus of the judge's inquiry is not whether it is reasonable to infer that the releasing parties *agreed* on a specific allocation of risk, but whether it is reasonable to *impose* on the releasor the risk for an unanticipated claim. If this conceptualization of the judicial activity is accepted, a clear definition of the substantive content of the default rule would enhance the transparency and predictability of judicial reasoning. Section III proposes a detailed default rule to provide guidance on the judicial allocation of risk associated with unknown claims.

B. What Language is Sufficient to Release Unknown Claims?

A second element of uncertainty concerns what *language* parties should use to include unknown claims in the scope of a release. Although in *Corner Brook*, the Supreme Court of Canada stated: "A release can cover an unknown claim with sufficient language,"[125] Rowe J failed to provide clear guidance on the language parties should adopt to clearly express the parties' objective intention

124. Conversely, the basis for excluding an unknown claim from the scope of the release is not the notion that the releasor did not agree to relinquish that claim, but the concern that the releasor should be permitted to advance claims of a kind that a reasonable person could not have contemplated when the release was signed (after diligently considering the possibility of their future emergence).

125. *Corner Brook*, *supra* note 7 at para 27.

to release unknown claims. Traditionally, courts have required clear and unequivocal language to conclude that the parties intended to release claims that they could not have anticipated at the relevant time.[126] Under this rule, the onus is on the releasee to ensure that specific language addressing unknown claims is included in the release to fully protect their interests.

However, against this jurisprudential backdrop, *Biancaniello* has recently marked a notable shift in the interpretative approach to general releases by affirming the principle that the language of the release need not refer to unknown claims to protect a releasee from future unanticipated claims. The broad language of a release is *assumed* to include all claims, whether known or unknown, related to the settled dispute. Under this rule, a releasor who is settling their claim should assume that a related unknown claim coming to light at a later date will be barred by the release. Therefore, if there is a possibility that an additional claim may arise in the future, the onus is on the releasor to negotiate a specific carve out or exclusion for any additional claim that may be advanced in the future that they are not willing to relinquish.

C. What Constitutes an Unknown Claim?

In cases in which releases are limited to known claims, a third uncertainty exists regarding what constitutes an unknown claim. While it is undisputed that a claim is unknown if its factual basis is not known to the parties at the time the release is given, it is less clear whether a claim should be regarded as unknown when its factual basis is known, but the parties are not cognizant at the relevant time of the existence of legal claims that subsequently arise from those facts. Courts adopting an objective understanding of the contemplation requirement tend to conclude that a claim was intended to be released if the underlying facts occurred at the time the release was executed. For example, in *IAP Claimant*, the Court excluded an unanticipated claim based on facts that were unknown, as they had not yet occurred at the time the release was executed. By contrast, courts emphasizing the subjective dimension of the contemplation requirement are reluctant to infer knowledge of a claim from knowledge of its underlying facts. In this view, a claim is considered unknown, despite the fact that the underlying factual elements were known to the parties, if the legal basis was not anticipated by them. For example, in *Privest*, the British Columbia Court of Appeal excluded from the scope of the release an unanticipated claim partially based on facts that were known or should have been known by the releasor at

126. See note 49 above.

the time the release was executed. The Court stated that the releasor's knowledge of a fact underlying a future claim does not justify the inference that the releasor specifically considered such a claim.[127]

The uncertainty over this issue stems from the fact that, from a conceptual standpoint, a claim cannot be distilled down to its factual basis or cause of action. As Beswick writes: "[c]ause of action and claim are not synonymous. The former is a precondition of the latter, but one only has a claim once one can plead a right to a remedy."[128] The distinction between cause of action and claim implies that one may be well aware of the material facts underlying a claim while ignoring the availability of a justiciable claim. Zacks observes, "[d]etermining the cause of action arising from a factual situation is frequently straightforward. However, determining when the facts that comprise the cause of action make the cause of action complete is not."[129] Given that parties may have knowledge of the underlying facts without being aware of the existence of a legal claim, the issue arises of whether the concept of the "unknown claim" encompasses claims based on facts known to the parties who nevertheless were not aware of the existence of justiciable claims. To the extent that uncertainty on this point remains, a defendant-releasee who signs a release covering known claims remains exposed to the risk that an additional claim may be brought at a later stage, even if the claim appears to be not factually distinct from the claim being released.

III. Delimiting the Scope of Release

This section proposes a rule governing the application of the principles of contractual interpretation in cases in which judges must decide whether a generally worded clause covers unknown claims. I contend that its adoption by courts would instill greater legal certainty and efficiency into future cases.

A. Proposed Rule

The preceding discussion has examined the evidentiary challenges confronted by judges in deciding whether unknown claims are included in the scope of generally worded releases. These challenges stem from the difficulties

127. See *Privest*, *supra* note 3 at para 15.

128. Samuel Beswick, "Error of Law: An Exception to the Discoverability Principle?" (2020) 57:2 Osgoode Hall LJ 295 at 304.

129. Daniel Zacks, "Claims, Not Causes of Action: The Misapprehension of Limitations Principles" (2018) 48:2 Adv Q 165 at 169.

of ascertaining the objective intention of the parties in situations where the evidence of what was in the parties' contemplation is lacking or equivocal, or where there is no indication of the parties' shared intention with respect to the relevant allocation of risk. I argued that, for these reasons, courts dealing with the task of deciding whether unknown claims are included within the scope of broadly worded releases are not engaging in a genuine interpretive exercise. Rather than ascertaining an implicit allocation of the risk by the parties, in accordance with the terms of the contract and the surrounding circumstances, judges are concerned with fairly and reasonably allocating a risk that parties have failed to allocate. Shortly put, courts are not inferring the parties' intention—they are rather *supplementing* an incomplete agreement.[130] If the account of the activity of the judge as a gap-filling exercise is accepted, then the transparency and predictability of judicial decision-making can be enhanced by clearly defining the default rule governing the release of unknown claims.

I contend that the transparency and predictability of judicial decision-making can be promoted through the court's application of the following principles:

1. A broadly worded release is presumptively intended to be applied to all claims that are part of the subject matter of the release and are known or could have been known with reasonable diligence by the plaintiff-releasor at the time the release was executed;
2. The plaintiff-releasor bears burden of proving that a claim was not known and could not have been known with reasonable diligence by the plaintiff-releasor at the time the release was executed.
   A claim is known when the plaintiff–releasor has knowledge that:

   a. The injury, loss, or damage had occurred;
   b. The injury, loss, or damage was caused by or contributed to by an act or omission;
   c. The act or omission was that of the person against whom the claim was made; and
   d. A proceeding would be an appropriate means to seek to remedy the injury, loss, or damage.[131]

130. While contractual *interpretation* focuses on recognizing the semantic content of the legal text, contractual *supplementation* concentrates on identifying a rule the contract fails to supply. See Eyal Zamir, "The Inverted Hierarchy of Contract Interpretation and Supplementation" (1997) 97:6 Colum L Rev 1710.

131. This wording largely borrows from the statutory definition of the discoverability of claim contained in section 5 of the Ontario *Limitations Act*, 2002, SO 2002, c 24, Schedule B.

These proposed interpretive rules differ from the current prevailing case law in three respects: (1) they establish the presumption that by signing a generally worded release agreement the parties have intended to release all claims that are known or should have been known with reasonable diligence by the releasing parties, (2) they provide clear criteria for allocating the burden of contractual clarity between the releasor and the releasee, and (3) they offer a clear definition of the meaning of "known claim".

B. Presumption of Release of Discoverable Claims

As previously noted, when determining whether an unknown claim is included in the scope of the release, courts face the challenge of inferring the objective intentions of the parties from evidence concerning the scenarios in the parties' contemplation at the time of execution of the release. This way of characterizing the judicial task generates uncertainty when applied to the issue of unknown claims, as it postulates the existence of unknown claims present in the parties' contemplation. The proposed rule alleviates this challenge by mandating judges *presume* that generally worded releases are objectively intended to release all claims that are known or knowable with reasonable diligence by the parties at the time the release was executed. This presumption facilitates the task of deciding whether a general release encompasses the unknown claim at issue in a given case, as it shifts the focus of the judicial inquiry from determining the contemplation of the releasing parties to assessing whether a reasonable person in the position of the releasor could have acquired knowledge of the claim by exercising reasonable diligence.[132]

Under the proposed rule, the judge conducts an objective assessment of the *discoverability* of claims based on the information available to the releasor at the time the release was signed. Once the judge has determined that the release could have been known to the releasor with reasonable diligence, the judge assumes that the claim was objectively intended to be released. By fully objectivizing the scope of the release, the rule relieves the judge from the difficult task of determining what was part of the bargain in the parties' "contemplation". This presumption fits coherently within the objective framework of contract formation, as it rests on the assumption that a reasonable person reading the releasing instrument would understand its all-encompassing terms as including all claims for which sufficient information is available to a diligent releasor.

132. See, JW Carter & Wayne Courtney, "Unexpressed Intention and Contract Construction" (2017) 37:2 Oxford J Leg Stud 326 at 331–32 (on the "presumptions of intention" in contract law.)

The proposed legal regime relies on the principle of discoverability, which is borrowed from the area of limitation periods. The problem of defining when a claim is discoverable has an analogous conceptual structure in the areas of limitation periods and interpretation of releases of unknown claims. In both contexts, the interpreter must identify the moment in which the claimant can be deemed to have had the possibility of acquiring knowledge of the constitutive elements of the claim so that the consequences of not taking legal action can be imputed to them. The conceptual similarity of the discoverability issue suggests that the principles used to define discoverability in the area of limitation periods can be usefully imported into the area of contractual interpretation to address the issue of the release of unknown claims. Arguably, the well-tested notion of the discoverability of a claim can inform the issue of unknown claims more coherently and predictably than the conceptually confusing framework based on intention-contemplation requirements.

It is worth emphasizing that the proposed rule is not without precedent in the case law. In *Tongue v Vencap Equities Alberta Ltd*, the Alberta Court of Appeal applied the discoverability principle to determine whether unknown claims were included in the scope of a release.[133] The dispute claim arose from the releasee's failure to register encumbrances. The facts occurred before the sign of the release, although "[t]here was no actual knowledge" of them.[134] After affirming the general principle that "a release cannot be effective . . . if it purports to waive a *cause of action* not known to the releasor",[135] the Court stated:

> In some cases, one may be able to argue that, if the releasor has before him sufficient material that puts him on his inquiry whether he has a cause of action but he makes no inquiry and instead signs a waiver or release, then *the release is effective notwithstanding that the releasor does not have precise knowledge of the cause of action*. In this case, one could fairly argue that these plaintiffs were not prudent in executing a release after having received a refusal to supply meaningful details of the inside information.[136]

133. See 1996 ABCA 208 [*Tongue*].

134. *Ibid* at para 25.

135. *Ibid* at para 26 [emphasis added].

136. *Ibid* at para 27 [emphasis added].

In this passage, the Court suggests that the inclusion of a claim in the scope of the release depends on whether the claim was *knowable* or *discoverable* through careful inquiry by the plaintiff-releasor at the time of signing. In the facts of the case, one could not fairly argue that the plaintiffs knew or should have known about the claim in question at the time of the release, as this would have meant searching more than 2000 titles, which "would be too much to expect".[137] The Court concluded that the release did not extinguish the claim.[138]

Clearly, there is a fine line between ascertaining the objective intention of the parties and inquiring into the discoverability of a claim. In most situations, the factors pointing to a conclusion that a claim was knowable or discoverable by the plaintiff may also point to a conclusion that the parties objectively intended to release an unanticipated claim. However, while factors proving discoverability and those proving objective intention may often overlap, the proposed discoverability rule has the advantage of simplifying the judge's evidentiary task, because it limits the judge's evidentiary assessment to objective factors concerning the discoverability of the unknown claim. The discoverability rule relieves the judge of the daunting task of drawing inferences about the parties' intentions in situations in which they have most likely not formed one.

By way of contrast, a judge taking the objective-intention approach must consider additional factors that, while not impinging on the discoverability of the claim, tend to negate an inference that the promisor assumed responsibility for the claim at issue in a given case. This further inquiry, beyond aggravating the judge's evidentiary task, gives the improvident releasor an incentive to falsely allege a lack of intention so as to circumvent the preclusive effect of the release. For example, a plaintiff-releasor who failed to anticipate a discoverable claim may try to circumvent the preclusive effect of the release by pointing to the disproportion between the (discoverable and yet unanticipated) loss she suffered after signing the release and the consideration received from the promisee. The releasor may argue that, although the claim was discoverable when the release was signed, the substantial disproportion between the discoverable loss suffered and the consideration received make it entirely unreasonable to infer that she was agreeing to release that claim. Allegations of this type, as repeatedly noted, are difficult to assess given the lack of any factual basis on which the judge could make a finding on how the parties allocated the risk in question. Against these evidentiary challenges, the proposed discoverability rule has the advantage of fitting the judge's evidentiary task to the available evidentiary basis. Rather than

137. *Ibid* at para 25.

138. See *Tongue*, *supra* note 133.

mandating that courts inquire into an often chimerical shared intention of the parties, it requires that judges determine whether the claimant could, on the facts available, have discovered the claim at issue.

C. Allocation of the Burden of Proof

Another source of uncertainty surrounding the interpretation of the scope of the release stems from the fact that the outcome is influenced by the judge's belief regarding who bears the burden of clarifying the scope of the release. The proposed rule promotes clarity by stating that the plaintiff-releasor who is advancing a claim bears the burden of proving that, at the time the release was signed, they could not, with reasonable diligence, acquire knowledge of the claim.

This rule has several advantages. First, it fosters the releasor's incentive to invest in the discovery of claims and to engage in forthright negotiations over a clear definition of the scope of the release. Under the proposed rule, by signing a general release, the releasor promises to relinquish all *discoverable* claims that are part of the subject matter of the release. Therefore, if they wish to maintain the right to advance future discoverable claims, the releasor has an incentive to invest resources in obtaining knowledge of all reasonably knowable claims and to negotiate express exclusions from the scope of the release of all discoverable claims they do not want to relinquish. In this way, the proposed rule promotes the goals of finality and efficiency underlying the law of release.[139] Yet, the presumptive rule may be perceived as misplacing the burden of proof in cases where an asymmetry of information concerning the discoverability of claims disfavours a sympathetic plaintiff-releasor. For example, victims of medical malpractice or other personal injury claimants who discover further injury years after settling their initial claim may be unable to advance their suit. However, this objection overlooks that the presumption does *not* apply when the claim is not knowable with reasonable diligence by the releasor. Claims that are

139. From a law and economics perspective, one could argue that if courts set the standard of reasonable diligence equal to the socially optimal level of investment in the discovery of claims, then the releasor would have incentive to choose the socially efficient level of investment in claim discovery. Under the assumption of the efficient standard of diligence, the releasor fully internalizes the costs and benefits of investing resources in discovering unknown claims, up to the point in which a reasonable person would do; by investing less than the reasonable level of effort required to discover claims they the possibility of negotiating specific exclusions from the scope of the release and, ultimately, the right to seek remedy for the discoverable claims.

not knowable with reasonable diligence by the releasor are not presumptively released.

From this perspective, the proposed presumption operates as a penalty default rule that motivates the party that enjoys an information advantage to disclose claims that are known to them but unknown to the other party.[140] By imposing a clear, objective standard of diligence on the releasor, it eliminates the possibility that releasors may escape the effect of the general release by opportunistically arguing that they did not anticipate the claim at the time of execution. At the same time, should an asymmetry of information favour the releasee, the releasee has an incentive to communicate the risk to the releasor when the release is signed so as to trigger the application of the presumption that known or knowable claims are included in the scope of the release.[141] By operating as a penalty rule, therefore, the proposed presumption gives both the releasor and the releasee an incentive to be forthcoming about which claims are released and to disclose the existence of circumstances that may give rise to future claims.

It is worth noting that an alternative rule stating that the releasee has the burden of proving that the claim advanced by the releasor was discoverable at the time of execution would frustrate the goals of finality and judicial efficiency. Under this rule, the releasee seeking to enforce a release would have to prove that the claim *could have been known to the releasor*. This shifts the burden of proving *ex post* the discoverability of the plaintiff's claim onto the party that does not have *ex ante* incentive to invest in their discovery, thereby creating a misalignment between incentives to invest in discovery and burden to prove discoverability.

D. Definition of Known Claim

A third source of uncertainty concerns the presence of an unknown claim when the judge finds the scope of the release to be limited to known claims. In such cases, it is unclear whether a claim must be regarded as unknown when the factual elements underlying the claim are known and yet the existence of the claim is not in the specific contemplation of the parties. The proposed rule adds clarity to this point by adopting a claim-based approach to the interpretation of

140. See Ian Ayres & Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99:1 Yale LJ 87.

141. At this point, releasors who insist on negotiating an exclusion of the claim would have to pay an insurance premium to the releasee.

the scope of general releases: it is the claim, not the particular cause of action, that is included in the scope of the release.[142] This approach improves legal certainty by providing a clear definition of an unknown claim. By borrowing, once again, from the law of limitation periods, this rule suggests that the knowledge of a claim is determined by the plaintiff's knowledge of the constitutive elements of a claim, such as injury, loss, or damage; causal connection with the act or omission of the person against whom the claim is made; and the proceeding functioning as an appropriate means to seek remedy. According to these criteria, a claim is deemed to be unknown not only when the factual basis is unknown but also when its factual basis is known and yet the claim is legally unknown.

One may be concerned that the proposed rule may increase the complexity of the law by introducing a rule that applies only to the narrow issue of determining the scope of general releases with respect to unknown claims. However, I have shown that the proposed discoverability rule is likely to simplify the judicial task and enhance contractual certainty. First, it simplifies the judicial task by relieving courts of the challenging task of inferring the parties' shared intention with respect to claims unknown to them at the time of the release. Second, it clearly defines the allocation of the burden of proof on the releasor and the releasee, thereby providing both judges and private parties with a rule that is easily predictable and administrable. Third, it strengthens the releasor's incentive to conduct a diligent discovery of claims and simultaneously gives releasing parties an incentive to communicate the risk of future claims and to be forthcoming about which claims are released. Arguably, these benefits outweigh the risk that the proposed rule may be misapplied or applied inconsistently due to the additional complexity involved, especially when this rule is compared with the inherent uncertainty associated with inferring the parties' objective intention with respect to unknown claims.

Conclusion

The legal uncertainty concerning the effect of general releases on claims unanticipated by releasing parties stems from difficulties encountered by courts in determining (1) the claims intended to be released and whether they were in the parties' specific contemplation at the time the release is given, (2) the language needed to include unknown claims in the scope of a general release, and (3) the factual and legal elements that satisfy the idea of an unknown claim, when releases do not explicitly include unknown claims.

142. See Zacks, *supra* note 129 at 181–183.

This article proposes that courts adopt three principles aimed at solving these problematic issues. First, it is presumed that a generally worded release is objectively intended to include all claims that are discoverable with reasonable diligence by the releasor at the time the release is given. Second, the releasor bears the burden of clarifying the scope of the release at the time of its execution. If a dispute subsequently arises over whether an unknown claim falls within the scope of those previously released, the plaintiff-releasor bears the burden of proving that at the time the release was signed they could not, with reasonable diligence, acquire knowledge of that claim. Third, judges should establish that the knowledge of a claim is determined by the plaintiff's knowledge of the constitutive elements of a claim, such as injury, loss, or damage; causal connection with the act or omission of the person against whom the claim is made; and the proceeding functioning as an appropriate means to seek remedy. Canadian courts' adoption of these three principles would improve the balance between permitting private parties to release every possible claim (whether known or unknown at the time of execution) in order to attain finality, while at the same time providing an incentive to the releasor to surrender only rights and claims of which they are aware and to negotiate *ex ante* an express exclusion from the scope of the release of claims that they do not want to relinquish.