Two cases, two different approaches; and the questions left unanswered: *R v Zamrykut* 2017 MBA 24

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For many of us, the last time we thought about the phrase *stare decisis* (Latin: "standing by things decided"[1]) was in law school, but the concept lies at the heart of the common law tradition: "the legal principle of determining points in litigation according to precedent."[2] It is the basis of being able to predict what a court will do. It allows lawyers to provide opinions to clients; and also how we prepare our documents, including factums and such. Precedents inevitably must change with the times; cleaving to the concept of *stare decisis* means that precedents will change, but only in small increments, and not suddenly and unpredictably.

When the courts treat a fact situation differently than they had before, it is often confusing. Does that mean that this is the new approach or an outlier? This is especially so when the court makes no comments on why they are treating a case differently than it last did. This sudden change in the way courts treat a set of similar facts is found in the Court of Appeal's treatment of two cases: *R v Zamrykut* [3] and *R v Le*.[4]

In the *Zamrykut*[5] case, the Court of Appeal granted a new trial on a claim of ineffective counsel. This is a novel case because claims of ineffective counsel are rare and, rarer still, successful. I submit that the Manitoba Court of Appeal correctly cited the law for proving ineffectiveness, but then failed to follow it in the way they had in 2011 in the *Le* case,[6] a case that the Court considered just six years earlier.

The accused was convicted of one count of sexual assault. He subsequently appealed the conviction, saying his counsel provided ineffective assistance. In support, the appellant filed new evidence which included, *inter alia*, an affidavit sworn by trial counsel. The affidavit explained his trial strategy, which was to avoid cross-examinations on inconsistencies between the accused and the victim. He said he thought the accused's credibility would be enhanced if the accused's evidence was consistent with the complainant's. Trial counsel also made a conscious decision not to call the friend who was apparently upstairs in the house where the sexual assault took place, because he thought he might say something unexpected that would hurt his case. Trial counsel also concluded it would be inappropriate to cross-examine the complainant regarding the boyfriend.

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[1] Oxford English Dictionary, online: < https://www.en.oxforddictionaries.com/english>
[2] *Ibid*.
[3] *R v Zamrykut* 2017 MBCA 24.
[4] *R v Le* 2011 MBCA 83.
[5] *Ibid*.
[6] *Ibid*.

At the appeal, this new evidence eventually went in by consent for the limited use of determining the claim of ineffective assistance of counsel.

The trial evidence was very limited, consisting of the complainant's and accused's testimony along with some text messages exchanged the next day.

The accused and the complainant went over to a friend's apartment, where the complainant undressed and got into bed with the accused and they had consensual sexual contact. The complainant said she felt uncomfortable because she had just broken up with her boyfriend. They talked and the accused continued the sexual contact; this time the complainant said no and they fell asleep together. Later the complainant awoke and found the accused was forcing vaginal intercourse (which the accused later denied). After the sexual assault they went back to sleep together in the same bed. The accused drove her home in the morning.

They exchanged a few text messages, each offering a different explanation of the intention of the words used. The complainant was not cross-examined by the accused's counsel about these texts.

The court then set out the three component test that has been used in dozens of cases before it, including the leading authority *R v B (GD)*,[7] and its own decision in *Le*.[8]

> (1) The factual component: an appellant must establish, on the balance of probabilities, the facts on which the claim of incompetency is based. If this is not established, there is no need to go any further.
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> (2) The prejudice component: if the factual foundation has been made, the court will, for the purpose of this component, assume incompetence on the part of counsel…. At this state an appellant must establish, on a balance of probabilities, the presumed incompetence resulted in a miscarriage of justice. If it did not, there is no need to go any further.
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> (3) The performance component: if it is determined that the reliability of the verdict was affected by the presumed incompetence, the court will then consider whether the actions of counsel were, in fact, incompetent. At this stage of the analysis, the presumption reverts to a 'strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance,' and the onus falls on an appellant to establish that it did not.[9] Again, that analysis is conducted without the benefit of hindsight.

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[7] *R v B (GD)* 2000 SCC 22 at para 29.
[8] *Supra* note 4 at para 189.
[9] *Supra* note 7 at para 27.

The court having set out the relevant principles, fails, seemingly, to apply some of them to the rest of the case. Is it telling that the court report of this case is divided into "The Issues; The Law; The Trial and The Decision," missing any reference, as we might expect, to "The Analysis"?

The court commenced this judgement by referring to its own case in *Le*.[10] It is interesting that the court should do so, because it ends up dealing with the present case in a manner very differently than how it dealt with *Le*.[11]

In *Le*,[12] the court broke down several discrete allegations of presumed ineffectiveness. The court then proceeded to set out each allegation and analyzed step-by-step whether each of the allegations, standing alone, would probably have changed the result of the trial,[13] keeping in mind the onus is on the appellant to prove, on the balance of probabilities, that each of one of the questionable actions would have affected the reliability of the verdict. Thus, in *Le*[14] the court did not consider the allegations cumulatively.

During this step-by-step analysis, if one or more of the allegations would have affected the reliability of the verdict, the court moves onto the third component: whether there was actual incompetence.

This form of analysis is contrasted with the finding of procedural unfairness, which leads invariably to a finding that a miscarriage of justice has taken place and a new trial is ordered at once. Examples of procedural unfairness are if the trial counsel was impaired, was in a clear conflict of interest,[15] or proceeded without or against the accused's instructions on fundamental issues, such as whether to plead guilty or to testify in court.

In *Le*,[16] there was no overriding procedural unfairness; consequently the court used a step-by-step analysis of each allegation of incompetence to see if it, standing alone, would probably affect the verdict reliability. (Incidentally*, Le's* appeal failed[17]).

In *Zamrykut*[18] however, the allegations were not treated in the same way: with respect, the court listed the allegations without asking whether each one would have affected the verdict. Why did the court treat both cases so differently? The court does not answer this question. Which approach is correct?

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[10] *Supra* note 4.
[11] *Supra* note 4 at para 188.
[12] *Supra* note 4.
[13] See, for example, *Le, ibid*.
[14] *Ibid*.
[15] *Supra* note 4 at para 182.
[16] *Ibid*.
[17] *Ibid*.
[18] *Supra* note 3.

If the court had considered the evidence in the *Zamrykut*[19] case as it did in *Le*,[20] the results of the appeal may have been different. For example, would the verdict have been affected if the defence had called the upstairs neighbor? Or, would the reliability of the verdict be affected if defence counsel had cross-examined the complainant about her relationship with her boyfriend? Who knows? One thing is clear: the appellant bears the burden to prove that the verdict would have been different – in other words, that there was prejudice.

If there has been no prejudice, the appeal fails. If, however, prejudice has been proven, the next step taken is the "Performance Component", which asks whether counsel actually acted incompetently. Here, the presumption reverts "to a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance"[21] and without the benefit of hindsight.

In the *Zamrykut*[22] case, the court accepts, without comment, the appellant's assertion that "while the trial counsel had a trial strategy, it was doomed to fail from the start"[23] and could only be described as not falling "within the wide range of reasonable professional assistance." There was no discussion. With all due respect, it seems that the court simply accepted the appellant's conclusion carte blanche.

Furthermore, the court did not comment about the "strong presumption that the defence counsel was competent. Interestingly neither did the two cases the court relied on*: R v JB*[24] and *R v Aulik*.[25] This reference to the "strong presumption" is listed in the Court's initial description of the three component test, but then says nothing more about it.

What would have happened if the Court discussed trial counsel's strategy? Looking at the trial counsel's submission,[26] it is clear that the defence tried to turn the case into a "he said-she said case", a common defence in a sexual assault case. By calling his client, he relied on R v W (D)[27] and argued that although the complainant's evidence may have had a degree of reliability, as we can presume the accused's evidence did too (at least we are not told otherwise), it is not an equal competition between believing the complainant versus believing the accused: the accused's evidence takes the day.

Respectfully, as noted, the court presents no independent findings or conclusion of their own; the court says they were adopting the conclusion of the case of *JB*,[28] a case that was only five

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[19] *Supra* note 3.
[20] *Supra* note 4.
[21] *Ibid* at para 189.
[22] *Supra* at note 3.
[23] *Ibid* at para 17.
[24] *R v JB* 2011 ONCA 404 at paras 3- 5.
[25] *R v Aulik* 2012 BCCA 340.
[26] *Supra* note 4 at para 3.
[27] *R v W(D)* 1991 Can LLI 93 (SCC).
[28] *Supra* note 24.

substantive paragraphs. But was it helpful to adopt the findings of a different court in a different case in lieu of providing its own conclusions? *JB*[29] was quite a different case: for example, the defence counsel, in her affidavit, admitted that she made no submissions about what she described as her primary strategy and that her failure to do so was a "slip". Also, defence counsel in her closing said [*sic*] that "the complainant in this matter, with respect to any of the elements of the offences(s) that are faced before the court, she was not shaken [in her testimony] and certainly with respect to the sexual assault and those elements of the offence in the cross-examination".[30] In other words, she abandoned her defence.

In the end, *Zamrykut's*[31] appeal was granted and a new trial was ordered. The court left open a number of questions. First, why did the court treat this case so differently than how it treated *Le*?[32] To what degree should the court discuss the defence counsel's strategy? Thirdly, what comments should be made about the "strong presumption"? Fourthly, what observations should be made about whether the strategy "fell within a wide range of reasonable professional assistance"? Should there be some sort of evidence? Without something else from the court, future appellants are left with little guidance.

What are counsel to do when faced with these two dramatic choices? Do future appeals follow the *Le*[33] or the *Zamrykut* approach?[34] How can we advise our clients what to expect or whether they should be proceeding with their claim at all? These questions will only be answered by the next time the Court of Appeal releases a decision on a claim of ineffective counsel.

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[29] *Supr*a note 24 at para 5.
[30] *Ibid*.
[31] *Supra* note 3.
[32] *Supra* at note 4.
[33] *Ibid*.
[34] *Supra* at note 4.