SUPREME COURT OF CANADA

Case in Brief: *Haaretz.com v. Goldhar*

2018 SCC 28 | Judgment of June 6, 2018 | On appeal from the Court of Appeal for Ontario

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Current rules to decide where a civil trial should happen are flexible enough and don't need to be changed to deal with online defamation, the Supreme Court has said. It would be fairer and more efficient for Israel to hear the defamation suit brought against an Israeli newspaper by a Canadian businessperson who owns an Israeli soccer team.

Mitchell Goldhar is a Canadian businessman who owns a popular Israeli soccer team. He had an apartment in Israel and visited every few months. In 2011, the Israeli newspaper Haaretz published an article criticizing his management of the team. The article also mentioned his Canadian business and management style generally. The article was published online and available for download in Canada and in Israel. Mr. Goldhar felt the article was untrue and unfair, and so sued Haaretz for libel (written defamation, or publishing false information that hurt his reputation). About 200-300 people in Canada and 70,000 people in Israel read the article.

This case involved online defamation in two different countries. When a legal dispute crosses borders, it may not be clear which courts should hear the case and which laws should apply. Courts decide these issues by applying "conflict of law" rules. Just because someone sues in a court in one place, it doesn't mean that that court is allowed to hear the case (or meets the first legal test, known as "jurisdiction *simpliciter*"). A court may also decide that, even though it is allowed to hear the case, it is clearly more appropriate for it to be heard somewhere else because it would be fairer and more efficient (in legal terms, the "*forum non conveniens*" test). Part of deciding the appropriate place for a case to be heard is deciding which laws should apply ("choice of law").

In part, conflict of laws rules are meant to prevent people from picking and choosing the place where the laws most benefit them (or most disadvantage their opponents).

In this case, Mr. Goldhar sued in Ontario, but Haaretz said the lawsuit should be heard in Israel. It filed a motion saying Ontario courts did not have jurisdiction, but even if they did, it was more appropriate for Israeli courts to hear the case. An Ontario judge ruled in Mr. Goldhar's favour on the issue, and the Court of Appeal agreed. Haaretz appealed to the Supreme Court.

Justice Suzanne Côté said that it was clearly more appropriate for the case to be heard in Israel. Even though there have been many changes in technology over the years, she said the current conflict of law rules are still flexible enough to deal with the challenges brought on by the increase in online publication. Courts have to keep basic principles of stability and fairness in mind when applying the rules. She said that under the rules Ontario courts had jurisdiction because the article was read in the province. (In law, defamation occurs when the untrue statement is "published," that is, when it is read or downloaded by even one person.) However, she said that it was clearly more appropriate for Israeli courts to hear the case. In her view, a trial in Israel would clearly be more convenient, efficient, and fair. Mr. Goldhar was well known in Israel and his claim was not limited to his Canadian reputation. Also, since Haaretz and most of its witnesses were based in Israel, a trial in Ontario would be unfair and inefficient for them. Two judges agreed with Justice Côté.

Justice Andromache Karakatsanis, in separate reasons, agreed with Justice Côté that Ontario courts should not hear Mr. Goldhar's case. She disagreed with Justice Côté on some specific points, but this did not affect her overall conclusion.

Justice Rosalie Silberman Abella also agreed that it was more appropriate for Mr. Goldhar's lawsuit to be heard in Israel. But she noted that the unique challenges posed by Internet defamation, where all it takes for defamation to occur is one download, meant it was time to change the approach. She proposed a new approach to both jurisdiction *simpliciter* and the choice of law under *forum non conveniens*. This would see courts focus on the place where the person suing suffered the greatest harm to his or her reputation. It would better respond to the

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reality of the Internet, emphasize the importance of reputation, and strike a better balance between freedom of expression and harm to reputation concerns.

Justice Richard Wagner (who was not yet Chief Justice when the appeal was heard) also agreed that Israeli courts should hear the case. However, he said the *forum non conveniens* analysis should be tweaked. Like Justice Abella, he said the choice of law in online defamation cases should be based on where the most harm to reputation occurred, not where the publication happened. (He did not think the rules about jurisdiction *simpliciter* needed to change, however.) Using this new approach, he determined that Israel was clearly a more appropriate place for the case to be heard than Ontario.

Then-Chief Justice Beverley McLachlin and Justices Michael Moldaver and Clément Gascon, writing in dissent, said that Ontario courts should hear the case. They agreed with Justice Côté that the current rules did not need to be changed to deal with online defamation. However, they thought that Justice Côté was not applying the rules of *forum non conveniens* properly in this case. These rules required that Haaretz meet a high threshold to show that the case should be heard in Israel. When the dissenting judges applied the rules to the facts, they found that Israel was not a clearly more appropriate place to hear the case than Ontario. They noted Mr. Goldhar was most concerned about his Canadian reputation. They said Ontario law should apply, and Ontario courts should be the ones to apply it.

This case was about how courts should deal with defamation claims in the Internet era, where material is "published" in more than one place. Most judges said that the existing rules were working and would not change them, but came to different conclusions when they applied the rules. In the end, a majority of judges agreed it would be clearly more appropriate for Mr. Goldhar's lawsuit to be heard in Israel. The Supreme Court did not decide on whether the Haaretz article was actually defamatory; it only decided that Israeli courts were in the best position to decide that.

For more information (case no. 37202):

- Reasons for judgment
- Case information
- Webcast of hearing

Breakdown of the decision:

- Reasons by: Côté J. (Brown and Rowe JJ. in agreement)
- Concurring (separate reasons): Karakatsanis J., Abella J. and Wagner J.
- Dissenting: McLachlin C.J. and Moldaver and Gascon JJ.

Lower court rulings:

- Court of Appeal for Ontario (appeal judgment)
- Ontario Superior Court of Justice (order on jurisdiction)

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