

# Torys on Privacy

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## Ontario's Top Court Recognizes New Privacy Tort

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On January 18, 2012, the Ontario Court of Appeal released its unanimous decision in *Jones v. Tsige*, recognizing a new common law cause of action for invasion of privacy. Citing the “clear trend in the case law” and the constitutional protection afforded to privacy interests by the Supreme Court of Canada, the Ontario Court confirmed the existence of a right of action for what it described as “intrusion upon seclusion.” This new form of civil claim protects a person from intentional, unjustifiable intrusion by another into the person’s private affairs, even if there is no resulting financial harm.

The decision represents a culmination of decades of judicial flirting with the concept of a nominate tort of invasion of privacy in Ontario. Prior to the Court of Appeal’s decision, most Ontario courts had been dismissive of such a tort. Underpinning the Court’s decision was the recognition that as technology continues to evolve, so must the common law, to protect against growing threats in the digital age to an individual’s privacy in sensitive, personal information.

### Background

The defendant, using her access as a bank employee, reviewed the plaintiff’s personal banking information at least 174 times over the course of four years. Although contrite for her clearly wrongful conduct, the defendant explained that she was having a financial dispute with her common law spouse, the plaintiff’s former husband, and was attempting to determine if he was paying child support. The defendant did not otherwise use or disclose the information. Although the plaintiff suffered no actual financial loss, she sued the defendant for damages, asserting breach of fiduciary duty and invasion of privacy. Both claims were dismissed on a motion for summary judgment. The plaintiff appealed the ruling that no tort of invasion of privacy existed under Ontario law.

### The Decision

In reversing the lower court’s decision, the Court of Appeal established a new tort of intrusion upon seclusion and awarded the plaintiff \$10,000 in damages.

Following U.S. privacy jurisprudence, the Court ruled that a plaintiff must plead and prove that

- i. the defendant intentionally or recklessly intruded on the plaintiff’s private affairs or concerns;
- ii. there was an absence of lawful justification; and
- iii. viewed objectively, the intrusion was highly offensive, causing distress, humiliation or anguish.

To discuss these issues, please contact the authors.

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Significantly, the Court noted that only intrusions into matters such as “one’s financial or health records, sexual practices and orientation, employment, diary or private correspondence” are likely to be described as objectively “highly offensive.” Addressing a concern that such a claim would open the floodgates of privacy litigation, the Court also noted that claims by those overly sensitive or unusually concerned about their privacy were excluded and that privacy rights were not absolute and will yield to other rights in appropriate circumstances. Further, while proof of economic loss was not required as an element of the cause of action, the Court noted that damage awards would typically be modest by modern standards, given the intangible nature of the interests protected by the tort.

The Court was at pains to note that its decision was confined to the “particular issues posed by the facts of the case” and the relatively narrow new tort of “intrusion upon seclusion.” The Court did not establish a wider tort of invasion of privacy covering other forms of breach of privacy, nor did it endorse a claim based on negligent forms of intrusion. The full implications of the Court’s decision remain to be seen, including whether it will result in more attempts to bring privacy class actions. What is clear, though, is that the Court has taken a step toward greater judicial recognition of privacy interests and the need for the common law to adapt to our ever-changing technological society. **1**