Cyber Breach, Online Harm, Privacy and the Difficulties of Inventing New Torts

How are the Courts dealing with claims arising from loss of private information? This talk compares English and Canadian law – and considers the case law, from press intrusion and stories about drug addiction, orgies and phone hacking to adtech, cookie consent and smart TVs.

Law makers around the world are now trying to regulate against online harms. They face a central difficulty, to strike a balance between freedom of expression, protection of marginalized groups, privacy and the removal of harmful content. A further problem is simply to define "harm" and how this might give rise to further evolutions in tort.

Speakers

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Where are we now?

English and Canadian law are alike in that both have only recently begun to address the misuse of private information through the law of tort. It is clear that this area will continue to develop because there is an imbalance between the profits to be earned from the exploitation (and misuse) of private information compared with the limited remedies available to affected individuals.

How did these new privacy torts evolve?

England and Wales

In England and Wales, the misuse of private information has only recently been classified as a tort. Under English law, the cause of action evolved from breach of confidence (a claim in equity). This evolution was an acknowledgment of the influence of human rights instruments, causing the courts to accept that personal information was worthy of protection of itself, even absent a relationship imposing a duty of confidence.

Parallel claims can be brought under the GDPR, if the data controller is at fault and if the affected individual has suffered pecuniary loss or distress.

Canada

In Canada (though not across Canada, where federalism cedes the development of tort law to the courts of various provinces) the last decade has seen the adoption several privacy torts from American law. The three torts to emerge since 2021 are intrusion upon seclusion, publicly placing a person in false light, and public disclosure of private embarrassing facts. These join the tort of misappropriation of personality, recognized since the 1970s.

What is the impact of defining these wrongs as a tort?

England and Wales

Until the decision in Vidal-Hall v Google *(2015)* in which the misuse of private information was finally defined as a tort, an individual could not recover tortious damages. For example, in Mosley v News Group Newspapers *(2008)*, Mosley suffered the humiliation of a breach of confidence and publication of a very private video, with no public interest being served. In this case, although Mosley's life had been ruined (and although News Group sold a lot of newspapers/advertising), his loss was limited to compensatory damages for injury to feelings, embarrassment and distress.

By contrast, in the phone hacking cases (after the misuse of private information was defined as a tort) Gulati & others v MGN Ltd *[2015],* very substantial awards of damages were made for the distress caused, together with separate awards of damages as compensation for the activities through which privacy was invaded.

In Lloyd v Google [2021], the Supreme Court also made it clear that "user damages" (i.e. the value of a putative licence for the information) would be available as damages for the misuse of private information too.

Canada

While Canadian courts award damages for each of the four privacy torts, the amounts available vary considerably; claims for intrusion upon seclusion (for which no loss or harm be demonstrated) are generally capped at $20,000 CAD (and the amounts awarded are generally considerably less than this), whereas a recent case in which the defendant publicly disclosed private facts *and* placed the plaintiff in a false light was found liable for $100,000 CAD in damages.

What is the current scope for a large class action about privacy?

England and Wales

In Lloyd v Google [2021], the Supreme Court was at pains to point out the differences between the misuse of private information and claims under the DPA. This case was about the Safari workaround and breaches of the DPA: no claim was made arising from the misuse of private information. Lloyd had attempted to pursue a class action in which Google would pay a tariff for each breach on a *"uniform per capita"* basis. The Supreme Court held that a data subject will only recover compensation under the DPA if they can prove they have suffered material damage or distress.

The Court did a comparison between the DPA and the misuse of private information, noting that:

(a) a failure to exercise reasonable care was required under the DPA to establish liability, whereas the a claim for misuse of private information required a deliberate act;
(b) breaches of privacy could give rise to a strict liability for the commission of the wrong itself (without proof of loss), whereas proof of material damage or distress has to be established under the DPA; and
(c) "user damages" would be available for the misuse of private information (i.e. the value of a putative licence) but not under the DPA.

These differences means that a class action based on the DPA will require individuals to "opt in" and to prove their loss (making the class much smaller). By defining the misuse of private information as requiring a deliberate act, it limited the scope of the tort. It cannot be argued that every data breach is a misuse of private information (with the duties and tortious liability which that would imply).

Canada

Recovery in the class actions context has become more complicated as recent certification-stage decision in cases, where claims for intrusion upon seclusion brought against data custodians because the actual act of intrusion was committed by third parties (e.g. hackers), not by the data custodians themselves (see for example *Del Giudice v. Thompson*, 2021 ONSC 5379 (CanLII), at para 137, following the appellate decision in *Owsianik v. Equifax Canada Co*., 2021 ONSC 4112 (CanLII). In these cases, courts have confined liability for the tort to the defendants who actually committed the act of intrusion, and not to custodians who were merely responsible for protecting the data when the intrusion occurred. Canadian decisions have also mirrored results in American decisions in which claims for negligence have failed at the certification stage due to a lack of actual loss by class members.

Canada's privacy torts operate independent of provincial and federal privacy statutes. At present, only some provinces' statutes contain private rights of action. Instead, the statutory obligations imposed on data custodians (concerning collection, retention, and safe storage practices) are used to flesh out duties and standards of care for the negligence claims that typically accompany privacy tort claims in court proceedings.

What's next?

Under the E-Commerce Directive, the larger platforms, as intermediaries, are deemed to have no knowledge of content and are prohibited from "general monitoring" of online activities. This means that the platforms cannot be used as gatekeepers to police the misuse of data. However, in England and Wales, the Courts increasingly require remedial activities involving a degree of monitoring to take place (such as Mosley v Google (*2015)*).

For a victim who has private, embarrassing content published on the internet, their recourse may be against the social media platforms (the GDPR right to be forgotten), requiring the platforms to consider whether the content is "inaccurate, inadequate, irrelevant or excessive" and whether there is a public interest in the information remaining available. Alternatively, content can be removed based on *ad hoc* user service agreements and company policies. However, at a policy level, the temptation is to treat the intermediaries as a way of tackling these issues at source by filtering and scanning for content.

There is no doubt that intermediary liability is at risk, as governments grapple with online harms. Taking the UK's Online Harms Bill as an example, the proposals include the introduction of new duties imposed on the platforms, such as the obligation to determine what is illegal and to proactively remove user content. Legal but harmful content is one of the concepts introduced by the act, but (at the time of writing) there is no firm definition of "harm". These ideas will change the commercial approach of the platforms and are likely to lead to an over-removal of content.

Canadian federal lawmakers are considering an approach similar to English bill. Widespread media coverage of the presence of hate symbols at the Freedom Convoy protest in Ottawa, followed by calls from anti-hate groups for regulation of social media platforms used to organize the protests, have renewed the vigour with which the government has pursued this plan. At time of writing, no

actual bill has been released, but the broad strokes of the planned bill have been roundly criticized. Criticisms have included the following:

- The proposed use of government-directed site blocking is a tool used by authoritarian regimes (such as Iran and North Korea);
- The proposed provision of subscriber information to Canada's intelligence agency raises the prospect of governments weaponizing the law to identify legitimate protests as anti-government; and
- The law could be used to silence not just speech by extremist groups, but speech by marginalized and racialized communities.

In parallel, it is also clear that new duties and new causes of action are being formulated against the larger platforms, including claims by non-users that they have been harmed by published content. The law relating to the loss of private information is likely to continue to evolve.

Cyber Breach, Online Harm, Privacy and the Difficulties of Inventing New Torts (list of cases)

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Development of law of confidence (English law)	
Campbell v MGM Ltd 2004 The Daily Mirror published a story entitled "Naomi: I am a drug addict" about Campbell's attendance at a Narcotics Anonymous clinic, together with photographs. Campbell had previously spoken to the media and denied taking drugs. At first instance, she had conceded that her conduct prevented her from objecting to the publication of her addiction because this was to put the record straight. The issue to be determined by the House of Lords was whether the further details of Campbell's treatment and the inclusion of photographs merely added "colour and credibility" to the story or whether these features were an impermissible invasion of privacy. The House of Lords weighed up the right to privacy (Article 8 of the European Convention) and freedom of expression (Article 10) and held that the extra details in the story were an unjustified infringement of Campbell's privacy and, in particular that the photographs added nothing of importance to it. Damages were awarded to Campbell in the sum of £2,500.	Claim: Breach of confidence and unlawful invasion of privacy under the DPA. "In this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for 'invasion of privacy': see Wainwright v Home Office [2003] 3 WLR 1137. But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions… The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information. In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip-searches are an example. The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because, although pleaded more widely, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, that is, the wrongful publication by the 'Mirror' of private information." (Nicholls) "This House decided in Wainwright v Home Office [2003] 3 WLR 1137 that there is no general tort of invasion of privacy. But the right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action, both at common law and under various statutes. One of these is the equitable action

	for breach of confidence, which has long been recognised as capable of being used to protect privacy… But although the action for breach of confidence could be used to protect privacy in the sense of preserving the confidentiality of personal information, it was not founded on the notion that such information was in itself entitled to protection. Breach of confidence was an equitable remedy and equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other. So the action did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it… In recent years, however, there have been two developments of the law of confidence, typical of the capacity of the common law to adapt itself to the needs of contemporary life. One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way. The second has been the acceptance, under the influence of human rights instruments such as article 8 of the European Convention, of the privacy of personal information as something worthy of protection in its own right... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people." (Hoffmann) "The action for breach of confidence is not the only relevant cause of action…. But the courts will not invent a new cause of action to cover types of activity which were not previously covered: see Wainwright v Home Office [2003] 3 WLR 1137…. That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy. But where

	existing remedies are available, the court not only can but must balance the competing Convention rights of the parties… …This begs the question of how far the Convention balancing exercise is premised on the scope of the existing cause of action. Clearly outside its scope is the sort of intrusion into what ought to be private which took place in Wainwright. Inside its scope is what has been termed the protection of the individual's informational autonomy' by prohibiting the publication of confidential information. …. …The position we have reached is that the exercise of balancing article 8 and article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential." (Hale)
Douglas v Hello (No.8) (2007) Michael Douglas and Catherine Zeta-Jones entered into an agreement with OK! magazine in which they granted exclusivity in respect of the publication of their wedding photos in return for payment of £1 million. To protect OK!'s exclusivity, elaborate measures were put in place to deny guests and employees at the wedding permission and opportunity to take photographs. The Douglases employed their own photographer and selected the photographs for publication. Hello! magazine obtained and published unauthorised photographs of the wedding which had been taken surreptitiously. Both OK! and the Douglases brought claims against Hello!. In Douglas v Hello (No.5) (2003), the Douglases succeeded in their claim against Hello! for breach of confidence. For that reason, there was no need to address their claim for breach of privacy. There was also a breach of the Data Protection Act. However, the damage to the Claimants was not caused by breach of the DPA and therefore damages under this head were nominal.	Claim: Breach of confidence and causing loss by unlawful means (interference with contractual or business relations) "In my opinion Lindsay J was right. The point of which one should never lose sight is that OK! had paid £1m for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of any photographs of the wedding. That was quite clear. Unless there is some conceptual or policy reason why they should not have the benefit of that obligation, I cannot see why they were not entitled to enforce it. And in my opinion there are no such reasons. Provided that one keeps one's eye firmly on the money and why it was paid, the case is, as Lindsay J held, quite straightforward. It is first necessary to avoid being distracted by the concepts of privacy and personal information. In recent years, English law has adapted the action for breach of confidence to provide a remedy for the unauthorized disclosure of personal information: see Campbell v MGN Ltd [2004] 2 AC This development has been mediated by the analogy of the right to privacy conferred by article 8 of the European Convention on Human Rights and has required a balancing of that right against the right to freedom of expression conferred by article 10. But this appeal is not concerned with the protection

In Douglas v Hello (No. 6) , the Douglases were awarded a total of £14,600 incorporating £3,750 each for distress, £50 each under the Data Protection Act and £7,000 for wasted costs. OK! was awarded damages for breach of confidence in the sum of £1,033,136. The Douglases were not part of Douglas v Hello (No. 8) 2007. the House of Lords was asked to determine whether Hello! was liable to OK! for wrongful interference with contractual or business relations or a breach of its equitable right to confidentiality in photographic images of the wedding. The House of Lords held that OK! had paid £1m for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of any photographs of the wedding and were entitled to enforce that obligation. It had no claim to privacy nor could it make a claim parasitic on the Douglases rights. Hello! had the necessary intention to cause loss but had not used unlawful means to interfere with the actions of the Douglases.	of privacy. Whatever may have been the position of the Douglases, who, as I mentioned, recovered damages for an invasion of their privacy , OK!'s claim is to protect commercially confidential information and nothing more. So your Lordships need not be concerned with Convention rights. OK! has no claim to privacy under article 8 nor can it make a claim which is parasitic upon the Douglases' right to privacy. The fact that the information happens to have been about the personal life of the Douglases is irrelevant. It could have been information about anything that a newspaper was willing to pay for. What matters is that the Douglases, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information." (Hoffmann) "As the law has developed breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ('confidential') information. It is important to keep these two distinct. In some cases information may qualify for protection both on grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy. Privacy can be invaded by further publication of information or photographs already disclosed to the public. Conversely, and obviously, a trade secret may be protected as confidential information even though no question of personal privacy is involved. " (Nicolls)
Mosley v News Group Newspapers [2008] Mosley sought an injunction against News Group to remove and prevent further publication of a video on its website. The video featured Mosley and 5 prostitutes. News Group had written a story headlined "F1 boss has sick Nazi orgy with 5 hookers", containing stills from the video. The story had massive, worldwide coverage. Mosley objected to the visual portrayal of his sexual activities but he also asserted that it had nothing to do with Nazism. The application for the injunction was not successful, even though the Court readily accepted there was no public interest in its publication. At the first	Claims: breach of confidence and invasion of personal privacy "Although the law of "old-fashioned breach of confidence" has been well established for many years, and derives historically from equitable principles, these have been extended in recent years under the stimulus of the Human Rights Act 1998 and the content of the Convention itself. The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence. That is because the law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem…

hearing, the Court concluded "that although this material is intrusive and demeaning, and despite the fact there is no legitimate public interest in its further publication, the granting of an order against this Respondent at the present juncture would merely be a futile gesture. Mosley made a claim for exemplary damages, which the judge refused to grant since this was without precedent in a case involving infringement of privacy. Mosley also made a claim for compensatory damages. The judge clearly struggled to calculate the sum payable for injury to feelings, embarrassment and distress, especially in circumstances where no libel claim (no injury to reputation) was pursued. For comparison, the judge also considered personal injury claims, noting that the ceiling for those claims was £220,000 for cases involving catastrophic physical injuries. Damages were awarded in the sum of £60,000 together with permanent injunction against News Group to prevent its further publication of the video.	In the light of the strict criteria I am required to apply, in the modern climate, I could not hold that any of the visual images, whether published in the newspaper or on the website, can be justified in the public interest. Nor can it be said in this case that even the information conveyed in the verbal descriptions would qualify… The cause of action now commonly described as infringement or breach of privacy, involving the balancing of competing Convention rights, usually those embodied in Articles 8 and 10, has recently evolved from the equitable doctrines that traditionally governed the protection of confidential information. Now (and especially since the formulation by Lord Nicholls in Campbell v MGN Ltd [2004] 2 AC 457) it is common to speak of the protection of personal information in this context, without importing the customary indicia of a duty of confidence. The question arises whether it may now be correct to apply the label of "tort" to this expanded cause of action. I was referred to some authorities which would certainly suggest not: see e.g. Kitetechnology v Unicor [1995] FSR 765, 777-778 and Douglas v Hello! Ltd [2006] QB 125 at [96]. It is, nonetheless, true that textbooks dealing with the law of tort such as Gatley on Libel and Slander (10th edn) and Clerk & Lindsell on Torts (19th edn) do address the subject as being within their remit… There is certainly no English authority which establishes that exemplary damages are recoverable in the context of this newly developed form of action. Nevertheless, I note that in Douglas v Hello! Ltd [2003] 3 All ER 996 Lindsay J was prepared to make the assumption that such an award was possible – even before their Lordships' exposition in Campbell. Yet, in the result, he made no such award. In the absence of any positive decision, it would involve something of a departure for a judge now to hold that such damages are indeed available on the list of remedies for infringement of privacy.... I therefore rule that exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority (whether

	statutory or at common law) to justify such an extension and, indeed, it would fail the tests of necessity and proportionality… Whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action… It has to be recognised that no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined. What can be achieved by a monetary award in the circumstances is limited. Any award must be proportionate and avoid the appearance of arbitrariness. I have come to the conclusion that the right award, taking all these considerations into account, is £60,000."
Misuse of private information is defined as a tort (English law)	
Vidal-Hall v Google (2015) Vidal-Hall had brought a claim challenging Google's use of cookies to track users' activities on the Safari browser. Google disputed the jurisdiction of the English Courts to determine the dispute, asserting that Vidal-Hall could not meet the conditions (a good arguable case or a serious issue to be tried) for service of the Claim Form out of the jurisdiction. Amongst other things, Google argued that a claim for the misuse of private information was not a tort and therefore Vidal-Hall was barred from using the jurisdictional gateway applicable to torts. Google also argued that the damage and distress claimed was insufficient to pass the threshold of seriousness required.	Claims: misuse of private information, breach of confidence, breach of DPA – application for service outside the jurisdiction "The claimants allege in respect of their claims for misuse of private information and/or breach of confidence, that their personal dignity, autonomy and integrity were damaged, and claim damages for anxiety and distress. In respect of their claims under the DPA, they claim compensation under section 13 of the DPA for damage and distress. In neither case is there a claim for pecuniary loss… Put shortly, if a claim for misuse of information is not a tort for the purposes of service out of the jurisdiction, but is classified as a claim for breach of confidence, then on the authority of Kitechnology BV v Unicor, which is binding on us, the claimants will not be able to serve their claims for misuse of private information on the defendant...

The Court of Appeal was asked to consider the decision of the first instance judge that (1) the misuse of private information was a tort and (2) whether a claim for compensation under section 13 of the Data Protection Act 1998 could be made if there was no pecuniary loss. The Court of Appeal held that the misuse of private information was indeed a tort and further that a claim could be made under s 13 of the DPA, even if there was no pecuniary loss.	The problem the courts have had to grapple with during this period has been how to afford appropriate protection to 'privacy rights' under article 8 of the Convention, in the absence (as was affirmed by the House of Lords in Wainwright v Home Office [2004] 2 AC 406) of a common law tort of invasion of privacy… How then should the action for misuse of private information be characterised? Mr White says that in the cases where it has been referred to as a tort, classification or nomenclature was not in issue. This is true. Nonetheless in our view, these references cannot be dismissed as a mere loose use of language; they connote an acknowledgement, even if only implicitly, of the true nature of the cause of action… Against this background, we cannot find any satisfactory or principled answer to the question why misuse of private information should not be categorised as a tort for the purposes of service out of the jurisdiction. Misuse of private information is a civil wrong without any equitable characteristics. We do not need to attempt to define a tort here. But if one puts aside the circumstances of its "birth", there is nothing in the nature of the claim itself to suggest that the more natural classification of it as a tort is wrong… We come back then to the question we have to decide. Against the background we have described, and in the absence of any sound reasons of policy or principle to suggest otherwise, we have concluded in agreement with the judge that misuse of private information should now be recognised as a tort for the purposes of service out the jurisdiction. This does not create a new cause of action. In our view, it simply gives the correct legal label to one that already exists. We are conscious of the fact that there may be broader implications from our conclusions, for example as to remedies, limitation and vicarious liability, but these were not the subject of submissions, and such points will need to be considered as and when they arise…

	Since what the Directive purports to protect is privacy rather than economic rights, it would be strange if the Directive could not compensate those individuals whose data privacy had been invaded by a data controller so as to cause them emotional distress (but not pecuniary damage). It is the distressing invasion of privacy which must be taken to be the primary form of damage (commonly referred to in the European context as "moral damage") and the data subject should have an effective remedy in respect of that damage. Furthermore, it is irrational to treat EU data protection law as permitting a more restrictive approach to the recovery of damages than is available under article 8 of the Convention. It is irrational because, as we have seen at paras 56 and 57 above, the object of the Directive is to ensure that data-processing systems protect and respect the fundamental rights and freedoms of individuals "notably the right to privacy, which is recognized both in article 8 of the [Convention] and in the general principles of Community law". The enforcement of privacy rights under article 8 of the Convention has always permitted recovery of non-pecuniary loss. Additionally, article 8 of the *Charter* of Fundamental Rights of the European Union ("the *Charter*") makes specific provision for the protection of the fundamental right to the protection of personal data: "everyone has the right to the protection of personal data concerning him or her". It would be strange if that fundamental right could be breached with relative impunity by a data controller, save in those rare cases where the data subject had suffered pecuniary loss as a result of the breach. It is most unlikely that the Member States intended such a result. In short, article 23 of the Directive does not distinguish between pecuniary and non-pecuniary damage. There is no linguistic reason to interpret the word "damage" in article 23 as being restricted to pecuniary damage. More importantly, for the reasons we have given such a restrictive interpretation would substantially undermine the objective of the Directive which is to protect the right to privacy of individuals with respect to the processing of their personal data… On the face of it, these claims raise serious issues which merit a trial. They concern what is alleged to have been the secret and blanket tracking and

	collation of information, often of an extremely private nature, as specified in the confidential schedules, about and associated with the claimants' internet use, and the subsequent use of that information for about nine months. The case relates to the anxiety and distress this intrusion upon autonomy has caused."
Warren v DSG Retail Ltd [2021] The case related to a low value dispute brought against a retailer. In 2018 DSG was the victim of a cyber-attack whereby its systems were accessed by an unauthorised third-party. Personal data relating to around 14 million data subjects was potentially accessed. The Plaintiff claimed that data relating to him was potentially compromised – his name, address, phone number, date of birth and email address. A claim was brought for breaches of the Data Protection Act 1998, misuse of private information, breach of confidence and negligence.	Claims: misuse of private information claims in the context of cyber breaches "[Misuse of Private Information "MPI"] imposes an obligation not to misuse private information. I accept that a 'misuse' may include unintentional use, but it still requires a 'use': that is, a positive action. In the language of Article 8 ECHR (the basis for the MPI tort), there must be an 'interference' by the defendant, which falls to be justified. I have not overlooked the Claimant's argument that the conduct of DSG was "tantamount to publication". Although it was attractively presented, I do not find it persuasive. If a burglar enters my home through an open window (carelessly left open by me) and steals my son's bank statements, it makes little sense to describe this as a "misuse of private information" by me. Recharacterizing my failure to lock the window as "publication" of the statements is wholly artificial. It is an unconvincing attempt to shoehorn the facts of the data breach into the tort of MPI."
Impacts (English law)	
Cooper v Turrell [2011] The Defendant made secret audio recordings of conversations with the Plaintiff, the subject matter of which related to the Plaintiff's health. The Defendant subsequently uploaded the recordings to the internet in the context of a dispute about the termination of the Defendant's employment.	Claims: assessment of damages for misuse of private information "Damages for defamation are a remedy to vindicate a claimant's reputation from the damage done by the publication of false statements. Damages for misuse of private information are to compensate for the damage, and injury to feelings and distress, caused by the publication of information which may be either true or false. In the present case the information was in part true (what Mr Cooper had disclosed to Mr Taylor) and in part false, namely that

	he was unfit to fulfil his responsibilities to the Company, and that this was on account of his suffering from a brain tumour… I shall award £50,000 to Mr Cooper as damages for libel and an additional £30,000 for damages for misuse of private information."
WXY v Gewanter [2013] The Defendant published allegations regarding the Plaintiff's sexual conduct and details of her private discussions concerning sensitive matters involving a head of state online.	Claims: assessment of damages for misuse of private information "It is clear from the trial judgment that the distress which Slade J found that the Claimant had suffered was the result of both his actual postings and his threatening to post further private and confidential information on the website. This has two consequences. First, the claim for harassment is not separate from the claim for misuse of private information. The harassment consisted in the actual and the threatened publications. It follows that I do not accept Mr Eardley's submission that damages for harassment and for misuse of private information should be assessed separately and added together to reach a total award. The second consequence of Slade J's findings is that, in so far as the distress resulted from the threats, then it is not related to the number of persons who read the website. That Mr Burby intended those threats to put pressure on the Claimant matters as much as the distress resulting from her learning that some people had in fact read the postings. It may be true that some, and perhaps most or even all, of those who read the website in England consisted of her lawyers and others close to her, but that does not mean that it was not distressing to her. The situation is different from a defamation action, where the main focus of the damage is to a person's reputation, and that is not damaged if the only publishees are people who know and believe the truth. It follows that the Court is not at a material disadvantage by reason of the fact that the Claimant might have suffered distress from publications abroad

	or as a result of other matters, such as her earlier lawsuits in which she had obtained injunctions restraining publication of the sexual allegation. … In my judgment the fact that Mr Burby was deliberately putting pressure on the Claimant by making and threatening to publish the information in question, and doing so for financial gain, makes this a serious case. So too does the sensitive and highly personal nature of the information, and the fact that its disclosure had the potential to cause the most serious interference with her family life. In my judgment the appropriate award to reflect the seriousness of the case is a total of £24,950, of which £5,000 is aggravated damages."
Gulati & others v MGN Ltd [2015] Following the phone hacking scandal, MGN Ltd (publishers of The Mirror, The Sunday Mirror and The People) made admissions as to its illicit hacking activities. Having admitted liability, it then proceeded to try to manage the victims' cases with a hearing of eight test cases to establish guidance for determining quantum. MGN admitted to wrongfully listening to private or confidential information left for or by the claimant, wrongfully obtaining private information via private investigators, and the publication of stories based on that information. However MGN argued that the claimants were merely entitled to damages for distress and injury to feelings. The Claimants asserted that they were entitled to wider damages, including vindicatory damages (a non-compensatory award to mark "the sense of public outrage, emphasise the	Claims: assessment of damages for infringements of privacy rights "At the heart of the difference between the parties on damages is the question of what the claimants can and should be compensated for. The case of the claimants is that the compensation should have several elements. There is compensation for loss of privacy or "autonomy" resulting from the hacking or blagging that went on; there is compensation for injury to feelings (including distress); and there is compensation for "damage or affront to dignity or standing". The defendant disputes this and submits that all that can be compensated for is distress or injury to feelings (I shall use "distress" as a shorthand for this in this judgment). It is accepted that such things as loss of autonomy are relevant, but only as causes of the distress which is then compensated for. They are not capable of sustaining separate heads of compensation… Those values (or interests) are not confined to protection from distress, and it is not in my view apparent why distress (or some similar emotion), which

importance of the constitutional right and the gravity of the breach, and deter future breaches".) The judge accepted the claimants' submission that compensation for misuse of private information was not limited to damage for distress but could include an award to reflect infringements of the right itself. He held there were three elements to be considered in a compensatory award: (i) loss of privacy or autonomy; (ii) injury to feelings including distress; (iii) for damage or affront to dignity or standing. The judge also held that the award of a single global sum was not required by case law and that to achieve a compensatory outcome "the wrongs have too great a degree of separation for that". Further, whilst previous case law ruled out "vindicatory damages", it did not rule out "compensation for the act of the misuse itself". The judge stated that the award of damages would be very substantial "far more substantial than in any hitherto reported privacy case. They are more substantial than in many libel cases. … The fact that they are greater than any other publicly available award results from the fact that the invasions of privacy involved were so serious and so prolonged." See also Court of Appeal decision Representative Claimants v MGN (MGN's appeal dismissed)	would admittedly be a likely consequence of an invasion of privacy, should be the only touchstone for damages. While the law is used to awarding damages for injured feelings, there is no reason in principle, in my view, why it should not also make an award to reflect infringements of the right itself, if the situation warrants it. The fact that the loss is not scientifically calculable is no more a bar to recovering damages for "loss of personal autonomy" or damage to standing than it is to a damages for distress. If one has lost "the right to control the dissemination of information about one's private life" then I fail to see why that, of itself, should not attract a degree of compensation, in an appropriate case. …If one assumes for the moment that what each claimant alleges to have happened has happened, the defendant will have helped itself, over an extended period of time, to large amounts of personal and private information and treated it as its own to deal with as it thought fit. There is an infringement of a right which is sustained and serious. While it is not measurable in money terms, that is not necessarily a bar to compensation (distress is not measurable in that way either). Damages awarded to reflect the infringement are not vindicatory in the sense of Lumba. They are truly compensatory… The tort is not a right to be prevented from upset in a particular way. It is a right to have one's privacy respected. Misappropriating (misusing) private information without causing "upset" is still a wrong. I fail to see why it should not, of itself, attract damages. Otherwise the right becomes empty, contrary to what the European jurisprudence requires. Upset adds another basis for damages; it does not provide the only basis… In my view, the case law does not bind me to take either a wrapped up approach, or a divided up approach. It demonstrates that the court can, and should, take an approach which is appropriate to achieve the objective of a compensatory award – to compensate the claimant properly and fairly for the wrong that he or she has sustained. In some cases a global award will be appropriate to that end; in others a more divided up approach will be appropriate. Furthermore, I accept there are three areas of wrongful

	behaviour which need to be looked at separately First there is the general hacking activity. Each of the individuals had their voicemails (and some of those whom they rang) hacked frequently (in their own cases daily), with most hacks not resulting directly in an article. Their private information was thus acquired and their right to privacy infringed, irrespective of whether an article was published. That fact makes it appropriate to take the activity separately and assess its effect (in terms of compensation) separately from damage arising from publication. It is something in respect of which the claimants are entitled to be compensated and if it is not treated separately from the effect of the articles its real impact may be lost, or perhaps even exaggerated. The only sensible approach is to take it separately from the effect of the articles. It amounts to a separate category of wrong which has to be separately reflected in order to ensure that the objective of the damages award achieves its aim… ... it is apparent to me that if the factual cases of the claimants on the scale of the invasions in the present cases are correct (and even on the admissions of the defendant) the scale of the invasion of privacy in the cases before me is very much greater than in any of the reported cases. The invasions of privacy in the present case were not invasions on a few closely related occasions, or invasions which ultimately led to the publication of one article (or a small number of factually closely related articles). Nor were they the equivalent of the publication of a photograph on two or three occasions. They were invasions which are said to have been carried out on a daily basis, and to have resulted in a number of articles which, while they may have a common theme, are not the equivalent of a libel repeated in several articles over a period. The present cases also contain invasions of privacy on a grand scale which did not result in any form of publication (save for discussions amongst journalists in some instances), and none of the reported cases involve that. So far as all that is true (and I think it is) they are very important distinguishing factors, which make the direct application of any of the figures in those cases inappropriate. It will be apparent that my awards of damages in this case are very substantial – far more substantial than in any hitherto reported privacy case.

	They are more substantial than in many libel cases. … The fact that they are greater than any other publicly available award results from the fact that the invasions of privacy involved were so serious and so prolonged.
Mosley v Google (2015) Following the earlier case against News Group International, Mosley brought an action against Google to enforce his rights to prevent processing that would cause him distress or damage and his "right to be forgotten". Google conceded that it was the data controller for the purposes of the DPA. However, it argued that it had protections under the E-Commerce Directive and, specifically, that the Court was prohibited from making orders that created an obligation amounting to general monitoring (Art 15). The judge held that although Google was afforded protection by the E-Commerce Directive, this directive did not apply to the processing of personal data and Mosley was therefore entitled to a remedy. In respect of the question of impermissible monitoring, the judge noted that Google was able to remove certain images (i.e. child sexual abuse imagery) without much effort and that a Court would need to consider whether removal of contain necessitated monitoring (contrary to Art 15).	Claim: misuse of personal information and breach of DPA
WM Morrison Supermarkets v Various Claimants [2021] The Supreme Court was asked to determine whether Morrisons was vicariously liable to its employees and former employees for the publication of their personal information on the internet by Mr Andrew Skelton. Mr Skelton was a senior auditor in Morrisons with a grudge. He had been asked to provide a copy of Morrisons payroll data to external auditors and he used this as an opportunity to make a copy for himself. He attempted to cover his tracks at each stage, before publishing the information on the	Claims: breach of statutory duty under DPA, misuse of private information and breach of confidence "In the present case, it is abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier. In those circumstances, applying the test laid down by Lord Nicholls in Dubai Aluminium in the light of the circumstances of the case and the relevant precedents, Skelton's wrongful conduct was not so closely connected with

internet, whilst attempting to frame another employee. He then pretended to be a concerned member of the public and notified three national newspapers about the data breach. The Claimants asserted that Morrisons was in breach of its statutory duties under the DPA, causing "distress, anxiety, upset and damage". The Court of Appeal had upheld the decision of the first instance judge, finding that "the tortious acts of Mr Skelton in sending the claimants' data to third parties were in our view within the field of activities assigned to him by Morrisons" and that the relevant facts constituted a "seamless and continuous sequence" or "unbroken chain" of events. However, the Supreme Court held that Skelton had departed from the scope of his employment and his wrongdoing was not within the field of activities assigned to him by Morrisons. The Supreme Court also addressed the question as to whether the DPA excluded the imposition of vicarious liability for (a) statutory torts committed by an employee data controller under the DPA and (b) misuse of private information and breach of confidence. The Supreme Court rejected the argument that the statute imposed liability on the data controller only and held that general principles as to vicarious liability under the common law should apply.	acts which he was authorised to do that, for the purposes of Morrisons' liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment…. The imposition of a statutory liability upon a data controller is not inconsistent with the imposition of a common law vicarious liability upon his employer, either for the breach of duties imposed by the DPA, or for breaches of duties arising under the common law or in equity. Since the DPA is silent about the position of a data controller's employer, there cannot be any inconsistency between the two regimes. That conclusion is not affected by the fact that the statutory liability of a data controller under the DPA, including his liability for the conduct of his employee, is based on a lack of reasonable care, whereas vicarious liability is not based on fault. There is nothing anomalous about the contrast between the fault-based liability of the primary tortfeasor under the DPA and the strict vicarious liability of his employer. A similar contrast can often be drawn between the fault-based liability of an employee under the common law (for example, for negligence) and the strict vicarious liability of his employer, and is no more anomalous where the employee's liability arises under statute than where it arises at common law."
Lloyd v Google [2021] Mr Lloyd brought a representative claim (a class action) against Google in respect of browser data from iPhone users the "Safari workaround". To do this, he had to show that each member of the class he represented had the same interest in the case. The Supreme Court overturned the Court of Appeal's finding that damages were recoverable under section 13 of the DPA for loss of control of data, even if the breach had not caused pecuniary loss or distress.	Claim: breach of statutory duty under DPA "Mr Lloyd accepts that he could not use this procedure to claim compensation on behalf of other iPhone users if the compensation recoverable by each user would have to be individually assessed. But he contends that such individual assessment is unnecessary. He argues that, as a matter of law, compensation can be awarded under the DPA 1998 for "loss of control" of personal data without the need to prove that the claimant suffered any financial loss or mental distress as a result of the breach. Mr Lloyd further argues that a "uniform sum" of damages can properly be awarded in relation to each person whose data protection rights have been

The Supreme Court also addressed whether Mr Lloyd's approach to the representative action was legitimate. Instead of limiting the action to a principled decision/declaration on liability, Mr Lloyd had persuaded the Court of Appeal that it was legitimate for damages to be assessed on a "uniform per capita basis". In other words, that uniform damages should be awarded to each member of the class. This decision was also overturned by the Supreme Court. The Supreme Court held that a data subject will only recover compensation under the DPA if they can prove they have suffered financial loss or damage. Further, the representative action was "doomed to fail". It was not possible to avoid the compensatory principle on which damages for a civil wrong are calculated (i.e. an individualised assessment of the damage). The Supreme Court also did a comparative exercise between claims under the DPA and claims for misuse of private information, noting that: (a) a failure to exercise reasonable care was required under the DPA to establish liability, whereas the a claim for misuse of private information required a deliberate act; (b) breaches of privacy could give rise to a strict liability for the commission of the wrong itself (without proof of loss), whereas proof of material damage or distress has to be established under the DPA; and (c) user damages would be available for the misuse of private information (i.e. the value of a putative licence) but not under the DPA.	infringed without the need to investigate any circumstances particular to their individual case. The amount of damages recoverable per person would be a matter for argument, but a figure of £750 was advanced in a letter of claim. Multiplied by the number of people whom Mr Lloyd claims to represent, this would produce an award of damages of the order of £3 billion… In order to recover compensation under the DPA 1998 for any given individual, it would be necessary to show both that Google made some unlawful use of personal data relating to that individual and that the individual suffered some damage as a result. The claimant's attempt to recover compensation under the Act without proving either matter in any individual case is therefore doomed to fail… What limits the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded with the object of putting the claimant - as an individual - in the same position, as best money can do it, as if the wrong had not occurred. In the ordinary course, this necessitates an individualised assessment which raises no common issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned. A representative action is therefore not a suitable vehicle for such an exercise… In formulating the claim made in this action, the claimant has not adopted the "top down" approach of claiming compensation for damage suffered by the class as a whole without reference to the entitlements of individual class members. The claim advanced is for damages calculated from the "bottom up". The way in which the claimant seeks to obviate the need for individualised assessment is by claiming damages for each class member on what is described as a "uniform per capita basis". The difficulty facing this approach is that the effect of the Safari workaround was obviously not uniform across the represented class…

	First, to recover compensation under this provision it is not enough to prove a breach by a data controller of its statutory duty under section 4(4) of the Act: an individual is only entitled to compensation under section 13 where "damage" - or in some circumstances "distress" - is suffered as a consequence of such a breach of duty. Second, it is plain from subsection (2) that the term "damage" as it is used in section 13 does not include "distress". The term "material damage" is sometimes used to describe any financial loss or physical or psychological injury, but excluding distress (or other negative emotions not amounting to a recognised psychiatric illness): see eg Watkins v Secretary of State for the Home Department [2006] UKHL 17; [2006] 2 AC 395, para 7. Adopting this terminology, on a straightforward interpretation the term "damage" in section 13 refers only to material damage and compensation can only be recovered for distress if either of the two conditions set out in subsection (2) is met… The reasons why no claim is made in tort for misuse of private information have not been explained; but the view may have been taken that, to establish a reasonable expectation of privacy, it would be necessary to adduce evidence of facts particular to each individual claimant. In Vidal-Hall, the claimants produced confidential schedules about their internet use, showing that the information tracked and collected by Google in their cases was, in the Court of Appeal's words at [2016] QB 1003, para 137, "often of an extremely private nature". As discussed earlier, the need to obtain evidence in relation to individual members of the represented class would be incompatible with the representative claim which Mr Lloyd is seeking to bring… Similarly, to recover damages for distress under section 13(1) of the DPA 1998 would require evidence of such distress from each individual for whom such a claim was made. Again, this would be incompatible with claiming damages on a representative basis. Instead of making either of these potential claims, the claimant seeks to break new legal ground by arguing that the principles identified in Gulati as applicable to the assessment of damages for misuse of private information at

	common law also apply to the assessment of compensation under section 13(1) of the DPA 1998. The case advanced, which is also supported by the Information Commissioner, is that the word "damage" in section 13(1) not only extends beyond material damage to include distress, as decided in Vidal-Hall, but also includes "loss of control" over personal data… There are significant differences between the nature and scope of the common law privacy tort and the data protection legislation, to which I will draw attention in a moment. But the first point to note is that the decision in Gulati that damages can be awarded for misuse of private information itself was not compelled by article 8 of the Convention; nor did article 8 require the adoption of the particular legal framework governing the protection of personal data contained in the Data Protection Directive and the DPA 1998… While the House of Lords in Campbell drew inspiration from article 8, it did not suggest that the Convention or the Human Rights Act 1998 required the recognition of a civil claim for damages for misuse of private information in English domestic law, let alone that damages should be recoverable in such claim where no material damage or distress has been caused. In Gulati the Court of Appeal rejected an argument that the approach to awarding damages for misuse of private information ought to follow the approach of the European Court of Human Rights in making awards of just satisfaction under article 41 of the Convention. As Arden LJ observed, at para 89, in awarding damages for misuse of private information, the court is not proceeding under section 8 of the Human Rights Act 1998 or article 41 of the Convention, and the conditions of the tort are governed by English domestic law and not the Convention… Accordingly, the fact that the common law privacy tort and the data protection legislation have a common source in article 8 of the Convention does not justify reading across the principles governing the award of damages from one regime to the other….

	It is plain that the detailed scheme for regulating the processing of personal data established by the Data Protection Directive extended beyond the scope of article 8 and much more widely than the English domestic tort of misusing private information. An important difference is that the Directive (and the UK national legislation implementing it) applied to all "personal data" with no requirement that the data are of a confidential or private nature or that there is a reasonable expectation of privacy protection. By contrast, information is protected against misuse by the domestic tort only where there is a reasonable expectation of privacy. The reasonable expectation of privacy of the communications illicitly intercepted by the defendants in the phone hacking litigation was an essential element of the decision in Gulati that the claimants were entitled to compensation for the commission of the wrong itself. It cannot properly be inferred that the same entitlement should arise where a reasonable expectation of privacy is not a necessary element of the claim… Another significant difference between the privacy tort and the data protection legislation is that a claimant is entitled to compensation for a contravention of the legislation only where the data controller has failed to exercise reasonable care. Some contraventions are inherently fault based… The privacy tort, like other torts for which damages may be awarded without proof of material damage or distress, is a tort involving strict liability for deliberate acts, not a tort based on a want of care. No inference can be drawn from the fact that compensation can be awarded for commission of the wrong itself where private information is misused that the same should be true where the wrong may consist only in a failure to take appropriate protective measures and where the right to compensation is expressly excluded if the defendant took reasonable care. Indeed, this feature of the data protection legislation seems to me to be a yet further reason to conclude that the "damage" for which an individual is entitled to compensation for a breach of any of its requirements does not include the commission of the wrong itself. It would be anomalous if failure to take reasonable care to protect personal data gave rise to a right to

	compensation without proof that the claimant suffered any material damage or distress when failure to take care to prevent personal injury or damage to tangible moveable property does not… A claim in tort for misuse of private information based on the factual allegations made in this case, such as was made in Vidal-Hall, would naturally lend itself to an award of user damages. The decision in Gulati shows that damages may be awarded for the misuse of private information itself on the basis that, apart from any material damage or distress that it may cause, it prevents the claimant from exercising his or her right to control the use of the information. Nor can it be doubted that information about a person's internet browsing history is a commercially valuable asset…"

Intrusion upon seclusion (Canadian law)	
Jones v. Tsige, 2012 ONCA 32 (CanLII) The plaintiff and the defendant did not know each other, but they worked for different branches of the same bank and the defendant had formed a common law relationship with the plaintiff's ex-husband. For about four years, the defendant used her workplace computer to access the plaintiff's personal bank accounts at least 174 times. She did not publish, distribute or record the information in any way. When she discovered the conduct, the plaintiff brought an action for damages for invasion of privacy and moved for summary judgment. The defendant brought a cross-motion for summary judgment dismissing the action. The motion judge found that the tort of invasion of privacy does not exist at common law in Ontario. He dismissed the plaintiff's motion and granted the defendant's motion. The plaintiff appealed. Held: the appeal was allowed. The Court of Appeal held a right of action for intrusion upon seclusion should be recognized in Ontario, finding that prior case law supported its existence, and noting that privacy had long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy; and *Charter* of Rights and Freedoms jurisprudence recognizes privacy as a fundamental value in our law and as a constitutional right.	Claim: intrusion upon seclusion (against an individual) [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would [page 262] include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum. … [83] Absent proof of actual pecuniary loss, the awards are, for the most part, modest. For example, in Heckert v. 5470 Investments Ltd., [2008] B.C.J. No. 1854, 2008 BCSC 1298, 299 D.L.R. (4th) 689, [page265] the judge noted [at para. 148] that the only evidence regarding damages were "Ms. Heckert's general statements that she felt stressed and needed to see her chiropractor and acupuncturist for additional visits". The judge still found that Ms. Heckert's landlord had invaded her privacy by installing close imaging cameras in the hallway outside of her door, but that the lack of medical evidence meant that the award could be not more than nominal damages of $3,500. … [87] In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to $20,000. The factors identified in the Manitoba *Privacy Act*, which, for convenience, I summarize again here, have also emerged from the decided cases and

	provide a useful guide to assist in determining where in the range the case falls: (1) the nature, incidence and occasion of the defendant's wrongful act; (2) the effect of the wrong on the plaintiff's health, welfare, social, business or financial position; (3) any relationship, whether domestic or otherwise, between the parties; (4) any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and (5) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant. [88] I would neither exclude nor encourage awards of aggravated and punitive damages. I would not exclude such awards as there are bound to be exceptional cases calling for exceptional remedies. However, I would not encourage such awards as, in my view, predictability and consistency are paramount values in an area where symbolic or moral damages are awarded and absent truly exceptional circumstances, plaintiffs should be held to the range I have identified.
Del Giudice v. Thompson, 2021 ONSC 5379 (CanLII) [2] In this proposed class action under the Class Proceedings Act, 1992,[1] it is alleged that on March 22 or 23, 2019, the Defendant Paige Thompson hacked the data base of personal information collected by the Defendants Capital One Financial Corporation, Capital One, N.A., Capital One Bank (USA), N.A., Capital One Bank (Canada Branch), Capital One Services Canada Inc., (collectively "Capital One") from American and Canadian citizens. The Capital One data was stored on the computer servers of the Defendants Amazon Web Services Inc., and Amazon Web Services (Canada) Inc. (collectively "Amazon Web"). Ms. Thompson misappropriated the data. She posted the data on the website of the Defendant GitHub, Inc., which provides a forum for software developers to share information. As a consequence of this data breach, personal and confidential information of 106 million applicants for Capital One credit	Claim: intrusion upon seclusion (against an individual *and* data custodians) [137] During the course of the oral argument, the Plaintiffs' reliance on the certification motion decision in *Owsianik v. Equifax Canada Co.*,[62] dissipated. In the Equifax case, Justice Glustein had held that it was not plain and obvious that Equifax's alleged reckless and negligent failure to implement adequate cybersecurity could not satisfy the recklessness element of seclusion on intrusion and that it was not plain and obvious that a person who was reckless in facilitating an intrusion on seclusion could not also be liable for intrusion. A majority of the Divisional Court disagreed.[63] In the immediate case, I am bound to follow the decision of the Divisional Court. In the Equifax case, Justice Ramsey stated at para. 55: 55. I agree with my colleague (paragraph 43) that Equifax's actions, if proven, amount to conduct that a reasonable person could find to be highly offensive. But no one says that Equifax intruded, and that is the central

cards was exposed or became vulnerable to exposure to the public. It is estimated that approximately six million Canadians were affected. Held: certification of the claim for intrusion upon seclusion (along with all other causes of action) was refused. The claim for intrusion upon seclusion could not succeed against the data custodians because they themselves had not committed the act of intrusion that was central to the tort.	element of the tort. The intrusion need not be intentional; it can be reckless. But it still has to be an intrusion. It is the intrusion that has to be intentional or reckless and the intrusion that has to be highly offensive. Otherwise, the tort assigns liability for a completely different category of conduct, a category that is adequately controlled by the tort of negligence. [138] Adding to what Justice Ramsey said, I would add that if the tort of intrusion on seclusion would assign liability without an intrusion, then it would assign liability to categories of misconduct that are adequately controlled by an assortment of other possible torts, by statutory provisions, and by actions for breach of contract. The Court of Appeal in Jones v. Tsige, however, intended intrusion on seclusion to fill gaps in the law of privacy not pave them over. [139] Second, assuming I am wrong and the alleged misdeeds of Capital One and of Amazon Web were an intrusion, then it was not an unauthorized intrusion. The Plaintiffs' pleadings that the applicants for credit did not authorize Capital One's retention of personal information on the servers of Amazon Web are not capable of proof because they are belied by the terms of the Application form and by the Credit Agreement and the Privacy Policy, which are incorporated by reference into the pleading. I have highlighted above the numerous provisions in the contract documents that address the uses that can be made with the personal information.
Public disclosure of private facts (Canadian law)	
Jane Doe 72511 v. N.M., 2018 ONSC 6607 (CanLII) N physically assaulted and threatened the plaintiff over a period of about six months while they were living together in the residence of N's parents, the Ms. Some of the abuse occurred while the plaintiff was pregnant. The Ms witnessed the abuse but did not intervene. The plaintiff ultimately called the police, and N was charged with and convicted of assault. In order to punish the plaintiff for reporting him to the police, N uploaded a sexually explicit video of her on a pornographic website without her knowledge. By the time	Public disclosure of private facts To establish liability, the plaintiff must prove that (a) the defendant publicized an aspect of the plaintiff's private life; (b) the plaintiff did not consent to the publication; (c) the matter publicized or its publication would be highly offensive to a reasonable person; and (d) the publication was not of legitimate concern to the public. In this case, the plaintiff had proved all of the elements of the tort. In posting the sexually explicit video of her, N publicly disclosed an aspect of her private life without her consent. A

the plaintiff found out about the video and had it taken down, it had been viewed over 60,000 times. The plaintiff sued N and the Ms for damages. They did not defend the action, and she moved for default judgment. Held, the motion should be granted. The tort of public disclosure of private facts should be recognized in Ontario. A cause of action for public disclosure of private facts represents a constructive, incremental modification of existing law to address a challenge posed by new technology.	reasonable person would consider the posting of the video highly offensive. The plaintiff's face and body were clearly visible, and the title given to the posting was degrading and racist. There was nothing about the video that gave the public a legitimate interest in its publication. N was liable to the plaintiff for his public disclosure of her private information. The plaintiff was awarded general damages in the amount of $20,000 for assault and battery. While she did not suffer any permanent physical injuries, the abuse left her with significant emotional and psychological trauma. For public disclosure of private facts, the plaintiff was awarded general damages of $50,000, aggravated damages of $25,000 and punitive damages of $25,000.
Publicly placing a person in a false light (Canadian law)	
Yenovkian v. Gulian, 2019 ONSC 7279 (CanLII) A father of two children engaged in a multi-year cyberbullying campaign against the children's mother, posting on websites, in YouTube videos, in online petitions, and via email. Held: The last of four privacy torts set out in the American *Restatement*—publicity placing a person in a false light—should be recognized.	Claim: Publicly placing a person in a false light [170] With these three torts all recognized in Ontario law, the remaining item in the "four-tort catalogue" of causes of action for invasion of privacy is the third, that is, publicity placing the plaintiff in a false light. I hold that this is the case in which this cause of action should be recognized. It is described in § 652E of the *Restatement* as follows: *Publicity Placing Person in False Light* One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and

	(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. [171] I adopt this statement of the elements of the tort. I also note the clarification in the *Restatement*'s commentary on this passage to the effect that, while the publicity giving rise to this cause of action will often be defamatory, defamation is not required. It is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person's privacy right to control the way they present themselves to the world. … [187] On damages for intrusion on seclusion, the Court of Appeal in Jones v. Tsige held at paragraphs 87-88 that damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest, in a range up to $20,000. The important distinction with the two invasion of privacy torts in issue here, however, is that intrusion on seclusion does not involve publicity to the outside world: they are damages meant to represent an invasion of the plaintiff's privacy by the defendant, not the separate and significant harm occasioned by publicity. … [190] I likewise adopt the method of looking to the factors applied to decide damage awards for a tort causing harms analogous to those the present plaintiff has suffered for invasion of privacy. The harm arising from the invasion of privacy in the present case is akin to defamation. Accordingly, in arriving at an award of non-pecuniary damages, I am guided by the factors described by Cory J. in *Hill v Church of Scientology*, at para. 187, which I am adapting to the tort of publicity placing a person a false light: a) the nature of the false publicity and the circumstances in which it was made,

	b) the nature and position of the victim of the false publicity, c) the possible effects of the false publicity statement upon the life of the plaintiff, and d) the actions and motivations of the defendant. … [193] On the tort of invasion of privacy (false light and public disclosure of private facts), I award damages of $100,000, considering the conduct here and the range in the cases identified in *Rutman v. Rabinowitz*, 2018 ONCA 80 and *Mina Mar Group Inc. v. Divine*, 2011 ONSC 1172, and the increased potential for harm given that the publicity is by way of the internet, which is "instantaneous, seamless, interactive, blunt, borderless and far-reaching": B*arrick Gold Corp. v. Lopehandia* (2004), 2004 CanLII 12938 (ON CA), 71 O.R. (3d) 416 (Ont. C.A.) at para. 31. I find that third parties have commented on the websites and signed the petitions in both the UK and the US, and that Mr. Yenovkian has sent targeting e-mails and caused the distribution of flyers in the UK driving people to the websites in addition to the mere fact of publication.
Misappropriation of personality (Canadian law)	
Wiseau Studio, LLC et al. v. Harper et al., 2020 ONSC 2504 (CanLII) The plaintiff released a film so universally regarded as terrible that it became a cult classic, resulting in screenings around the world, a book about the film's making, a film adaptation of that book, and the documentary about the filmmaker and his film produced by the defendants to this action. The plaintiff sued, taking the position that the documentary filmmakers had misappropriated his personality.	Claim: Misappropriation of personality [211] The tort of misappropriation of personality is now well recognized in Canada, but is relatively undeveloped given the few cases in which it has been raised. It was first recognized and applied in three cases in the 1970s and 1980s: *Krouse v. Chrysler Canada Ltd*. (1974), 1973 CanLII 574 (ON CA), 1 O.R. (2d) 225 (C.A.) ("Krouse"); *Athans v. Canadian Adventure Camps Ltd.* (1977), 1977 CanLII 1255 (ON SC), 17 O.R. (2d) 425 (H.C.J.); and *Joseph v. Daniels* (1986), 1986 CanLII 1106 (BC SC), 4 B.C.L.R. (2d) 239 (B.C.S.C.). The most recent and thorough discussion of the tort is

Held, the case was dismissed. As the documentary was about the filmmaker, it could not be said that the documentarians had misappropriated his image to imply that the filmmaker had endorsed the documentary for the documentarians' commercial gain.	found in *Gould Estate v. Stoddart Publishing Co.* (1996), 1996 CanLII 8209 (ON SC), 30 O.R. (3d) 520 (Gen. Div.) ("Gould Estate"), involving a claim by the estate of the renowned Canadian pianist, Glenn Gould, arising from the publication of interviews and photographs of him in the 1950s in a book entitled Glenn Gould: *Some Portraits of the Artist as a Young Man*. [212] Although no firm definition has been adopted by the courts, the tort is established where one's personality has been appropriated, "amounting to an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff:" *Krouse*, at para. 43. However, in *Gould Estate*, Lederman J. discussed limits to the tort arising from concerns for the public interest and freedom of expression. He noted that the similar tort of the "right of publicity" in the United States has been limited to commercial activity and the exploitation of personality for commercial benefit, and has not been extended to activity that is newsworthy or is otherwise in the public interest. As Brotman D.J. stated in *Presley v. Russen,* 513 F. Supp. 1339 (U.S. Ct. D.N.J. 1981) ("Presley"), at page 1356, quoted by Lederman J. at para. 16 of *Gould Estate*: Thus, the purpose of the portrayal in question must be examined to determine if it predominantly serves a social function valued by the protection of free speech. If the portrayal merely serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing the free expression of creative talent, which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability. If, however, the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted. [213] I agree that similar concerns should limit the application of the tort of misappropriation of personality. … [215] Returning to Gould Estate, Lederman J. considered the fact that Gould was a celebrity and held, at para. 19, that a work in which the

	celebrity is the subject, such as a biography, "would not be within the ambit of the tort." This is in contrast to an activity in which the celebrity is used to endorse and promote a product for commercial gain. [216] While Gould – an acknowledged musical genius – and Wiseau may have little in common, they both have fame and are persons of interest to their followers. Wiseau travels the world promoting screenings of The Room. He likes being a man of mystery, not disclosing his origins or age, for example. He is active on social media, including attacking the defendants and their documentary. Room Full of Spoons is all about this – it is all about Tommy Wiseau and his work, The Room. Thus, to the limited extent - and the evidence is that it was very limited - that Wiseau's image was used in promoting interest in the documentary, it was simply to convey a message to those with an interest in Wiseau and The Room that Room Full of Spoons addresses those topics. In this regard, like the biography of Gould, the use of Wiseau's image in connection with the documentary "falls into the protected category and there cannot be said to be any right of personality …which has been unlawfully appropriated by the defendants:" *Gould Estate*, at para. 20. [217] In any event, if damages must be shown to make out the tort, as suggested in Krouse, Wiseau has not led any evidence of damage to his personality or its value.