Rechtspraak Aansprakelijkheids- en Verzekeringsrecht

Praktisch bewerkt

In dit nummer:

RAV 2017/1
EHRM 18 oktober 2016
Recht op privéleven. Vormt het heimelijk laten observeren van verzekerde een schending van art. 8 EVRM, gelet op de wettelijke grondslag hiertoe in het Zwitserse recht?

RAV 2017/2
HR 30 september 2016
Beroepsaansprakelijkheid advocaat. Verzuim om verjaring bevoegdheid tenuitvoerlegging rechterlijke uitspraak (art. 3:324 BW) te stuiten?

RAV 2017/3
HR 30 september 2016
Aansprakelijkheid arbiter. Heeft arbiter onrechtmatig gehandeld door er niet op toe te zien dat het onder zijn voorzitterschap gewezen arbitrale vonnis is ondertekend door zijn mede-arbiters en het arbitrale vonnis op die grond vernietigbaar is?

RAV 2017/4
HR 7 oktober 2016
Aansprakelijkheid wegbeheerder. Is de gemeente aansprakelijk voor letselschade als gevolg van struikelen over stroomkabels op de markt?

RAV 2017/5
HR 7 oktober 2016
Doorbraak van aansprakelijkheid. Kan een fraudeur zich verschuilen achter een door hem opgerichte rechtspersoon waarin hij zijn vermogen heeft ondergebracht?

RAV 2017/6
Hof Amsterdam 31 mei 2016
Levensverzekering. Is de mededelingsplicht geschonden door tussen het invullen van de gezondheidsverklaring en de definitieve acceptatie door de verzekeraar geen melding te maken van medische klachten en van een verwijzing naar een medisch specialist door de huisarts?

RAV 2017/7
Hof Amsterdam 28 juni 2016
Verzekeringsplicht. Heeft de eigenaar van een vrachtwagenaanhanger naar Nederlands recht een verzekeringsplicht voor de aanhanger? Heeft het Nederlands Bureau der Motorrijtuigverzekeraars een aan de WAM ontleend regresrecht ter zake van de aan het Duitse bureau 'Groene Kaart' gedane uitkering?

RAV 2017/8
Rb. Gelderland (vzr. Arnhem) 3 oktober 2016
Onrechtmatige daad Facebook. Handelt Facebook onrechtmatig door gegevens van Facebookgebruiker die dreigt intieme beelden van andere Facebookgebruiker online te plaatsen, niet te verstrekken?

RAV 2017/9
Rb. Midden-Nederland (vzr. Utrecht)
28 september 2016
Medische aansprakelijkheid. Hebben ouders bij een wrongful-lifevordering recht op vergoeding van de kosten van een vervangende woning?

RAV 2017/10
Rb. Rotterdam 21 september 2016
Infidelity-dekking. Hebben verzekeraars hun zorgvuldigheidsverplichting jegens verzekerde geschonden (en daarmee wanprestatie gepleegd) door de *infidelity*-verzekering niet te verlengen dan wel de schadeclaim van verzekerde inadequaat te behandelen?

NP/RSKAHVR-MI17001

Aflevering 1 **Jaargang 2017**
Nrs. 1-10 **Januari**

Wolters Kluwer

// Rechtspraak
Aansprakelijkheids- en Verzekeringsrecht

Praktisch bewerkt

Redactie
Mr. M.A.M. Vaessen (Rechtbank Gelderland)
Mr. P.M. Verbeek (Hof Den Haag)
Mr. O.L. Nunes (KBS Advocaten)

Secretaris van de redactie
Mw. mr. drs. M.N.H. van der Nat, Wolters Kluwer B.V., Postbus 23, 7400 GA Deventer, tel. (0570) 647816
e-mailadres: Marja.van.der.Nat@wolterskluwer.com

Uitgever
Mr. H.G.D. (Daniël) ter Horst

Medewerkers
Mw. mr. M. Boender-Lamers (Van Randwijck Advocaten)
Mr. M. Bruning (Lawyers' Specialist Bruning Cassatie-advocatuur)
Mw. mr. L.J. Couvret (VIVAT N.V.)
Mw. dr. drs. D.L.M.T. Dankers-Hagenaars (Universiteit van Amsterdam)
Mr. dr. T.J. Dorhout Mees (Nysingh advocaten-notarissen)
Mr. M.B. Esseling (V&A Advocaten)
Mr. M.R. Gans (PlasBossinade Advocaten)
Mr. M.E. Gelpke (Van der Feltz Advocaten)
Mr. J. den Hamer (Boekel De Nerée)
Mr. R.A. Hebly (SAP Letselschade Advocaten)
Mr. A. Hedeman (Lauxtermann Advocaten)
Mw. mr. S. de Nijs-van 't Hof (Bosselaar & Strengers Advocaten)
Mw. mr. dr. M.H. Pluymen (JPR Advocaten)
Mw. mr. A.K. Sjouw (NN Advocaten)
Mr. B.R. Tromp (Rechtbank Noord-Nederland)
Mw. mr. D.N.R. Wegerif (KBS Advocaten)
Mw. mr. A. van Wessel (Nauta Dutilh)
Mr. dr. W.C.T. Weterings (Dirkzwager Advocaten & Notarissen en de Universiteit van Tilburg)

Aanbevolen citeertitel: *RAV* 2017/1

Formule
RAV publiceert uitspraken van het Europees Hof voor de rechten van de mens, het Hof van Justitie, de Hoge Raad, gerechtshoven en rechtbanken op het gebied van het civiele aansprakelijkheids- en verzekeringsrecht. De uitspraken zijn, indien mogelijk, voorzien van:
- heldere formulering van de centrale rechtsvraag;
- samenvatting van de feiten;
- samenvatting van de overwegingen van de rechter;
- 'Zie ook': verwijzingen naar soortgelijke uitspraken;
- 'Zie anders': verwijzingen naar vergelijkbare casussen met een andere beslissing;
- 'Wenk': korte praktische tip voor de lezer.

De selectie van uitspraken is een verantwoordelijkheid van de redactie. De samenvattingen, de 'Zie ook/Zie anders'-verwijzingen en de wenk is een gezamenlijke verantwoordelijkheid van redactie en bewerkers, waarbij objectiviteit wordt nagestreefd.
De rubrieken 'Zie ook' en 'Zie anders' hebben uitdrukkelijk niet tot doel een 100% complete lijst van verwijzingen te geven.

Inzenden uitspraken
De redactie houdt zich graag aanbevolen voor interessante uitspraken die (nog) niet op rechtspraak.nl zijn gepubliceerd. U kunt de uitspraak aan ons toezenden via www.kluwer.nl/inzenden.

Overige informatie
RAV is een uitgave van Wolters Kluwer Nederland B.V., Postbus 23, 7400 GA Deventer
Verschijnt 11x per jaar.
Abonnementsprijs en productinformatie: Raadpleeg voor de productinformatie, de abonnementsmogelijkheden en de bijbehorende prijzen onze shop: www.wolterskluwer.nl/shop en zoek op RAV.
Abonnementenadministratie en productinformatie: Wolters Kluwer Nederland Klantenservice, Postbus 23, 7400 GA Deventer, www.wolterskluwer.nl/klantenservice.
Ook adres-/naamswijzigingen kunnen d.m.v. een verbeterd adreslabel worden doorgegeven aan voornoemd adres.
Nieuwe abonnementen: abonnementen kunnen op elk gewenst moment worden aangegaan voor de duur van minimaal één jaar, te rekenen vanaf het moment van eerste levering, en worden gefactureerd per jaar tenzij uitdrukkelijk schriftelijk anders is overeengekomen.
Abonnementen kunnen schriftelijk of per e-mail tot uiterlijk drie maanden voor het einde van de abonnementsperiode worden opgezegd. Bij niet tijdige opzegging wordt het abonnement automatisch met een jaar verlengd.
Gebruik persoonsgegevens: Wolters Kluwer Nederland B.V., hierna te noemen Wolters Kluwer, legt de gegevens van abonnees vast voor de uitvoering van de (abonnements-)overeenkomst. De gegevens kunnen door Wolters Kluwer worden gebruikt om u te informeren over onze relevante producten en diensten. Indien u hier bezwaar tegen heeft, kunt u contact opnemen met klantenservice.

Hoewel aan de totstandkoming van deze uitgave de uiterste zorg is besteed, aanvaarden de auteur(s), redacteur(en) en Wolters Kluwer geen aansprakelijkheid voor eventuele fouten en onvolkomenheden, noch voor gevolgen hiervan.
Alle rechten in deze uitgave zijn voorbehouden aan Wolters Kluwer. Niets uit deze uitgave mag worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen, of enige andere manier, zonder voorafgaande schriftelijke toestemming van Wolters Kluwer.
Voor zover het maken van kopieën uit deze uitgave is toegestaan op grond van art. 16h t/m 16m Auteurswet jo. Besluit van 27 november 2002, Stb. 575, dient men de daarvoor wettelijk verschuldigde vergoeding te voldoen aan de Stichting Reprorecht te Hoofddorp (Postbus 3060, 2130 KB).

ISSN 1874-275

RAV 2017/1

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
18 oktober 2016, nr. 61838/10
(L. López Guerra, H. Jäderblom, H. Keller, D. Dedov, B. Lubarda, P. Pastor Vilanova, G. A. Serghides)

Art. 6, 8 EVRM

NJB 2017/151
ECLI:CE:ECHR:2016:1018JUD006183810

Recht op privéleven. Heimelijke observaties. Invaliditeitsverzekering.

Vormt het heimelijk laten observeren van verzekerde een schending van art. 8 EVRM, gelet op de wettelijke grondslag hiertoe in het Zwitserse recht? Levert het niet uitsluiten van onrechtmatig verkregen onderzoeksresultaten een schending van art. 6 EVRM op?

Mevrouw Vukota-Bojić was slachtoffer van een verkeersongeval, waardoor zij nekletsel opliep. Zij maakte aanspraak op een invaliditeitsuitkering. Na jarenlange discussie over de hoogte van de uitkering en gerechtelijke procedures daarover verlangde de verzekeraar haar medewerking aan een nieuw medisch onderzoek, om aanvullend inzicht in haar medische situatie te verkrijgen. Toen zij dit weigerde, schakelde de verzekeraar privédetectives in om haar heimelijk te observeren. Het verkregen bewijs werd gebruikt in nieuwe gerechtelijke procedures en de uitkering werd verminderd.

EHRM: Het Hof oordeelt dat de handelwijze van de verzekeraar onder het EVRM kan worden aangemerkt als overheidshandelen. De verzekeraar had van overheidswege de bevoegdheid gekregen uitkeringen als de onderhavige te verstrekken, en de verzekeraar werd onder Zwitsers recht aangemerkt als overheidsorgaan.

Het Hof stelt vast dat het Zwitserse recht verzekeraars toestaat om – ingeval de verzekerde niet aan onderzoeken meewerkt – 'de nodige onderzoeksmaatregelen' te nemen om zo 'de benodigde informatie' te vergaren voor de uitoefening van wettelijke taken. Het Hof constateert een schending van art. 8 EVRM, het recht op respect voor het privéleven. Naar het oordeel van het hof is de wettelijke grondslag voor de observaties onvoldoende. Gelet op het heimelijke karakter van de observaties, stelt het EHRM hoge eisen aan de voorzienbaarheid en de bescherming tegen misbruik. Het Hof benadrukt het belang van procedures voor toestemming voor en toezicht op heimelijke observaties in de specifieke context van verzekeringsgeschillen met verzekeraars die handelen in de hoedanigheid van overheidsorgaan. Bij gebreke van wettelijke bepalingen met betrekking tot de maximale duur van de observaties en een rechterlijke toetsingsmogelijkheid hadden de verzekeraars een grote beoordelingsvrijheid met betrekking tot de vraag onder welke omstandigheden de observaties gerechtvaardigd waren, en voor hoe lang. Voorts wijst het Hof op het ontbreken van wettelijke bepalingen met betrekking tot de opslag van, de toegang tot en het gebruik van de gegevens en het doorgeven of vernietigen ervan. Uit de wettelijke grondslag voor heimelijke observaties dient te volgen op welke wijze en hoe lang mag worden geobserveerd, hoe de observatieresultaten mogen worden verwerkt en hoe lang deze bewaard blijven, aldus het Hof.

Het Hof ziet echter geen schending van art. 6 EVRM, nu Vukota-Bojić voldoende mogelijkheden had om het gebruik van observaties en het deskundigenrapport in rechte te bestrijden. Bovendien is het oordeel van het Federaal Gerechtshof ook gebaseerd op andere rapporten dan de observaties en het deskundigenrapport.

Zie ook:
- EHRM 4 december 2015, 47143/06 (*Roman Zakharov/Rusland*): verhoogde eisen aan voorzienbaarheid van inbreuk op art. 8 EVRM bij heimelijke observaties;
- EHRM 21 juni 2011, 30194/09 (*Shimovolos/Rusland*): wettelijke grondslag voor observaties dient afdoende duidelijke kaders te stellen;
- EHRM 2 september 2010, 35623/05 (*Uzun/Duitsland*): verhoogde eisen aan voorzienbaarheid van inbreuk op art. 8 EVRM bij verwerking van persoonsgegevens;
- HR 12 februari 1993, ECLI:NL:HR:1993:ZC0860, *NJ* 1993/234 (*Fernandes/Oostdam*) en HR 7 februari 1992, ECLI:NL:HR:1992:ZC0500, *NJ* 1993/78 (*Slempkes/Nool*): onrechtmatig bewijs hoeft in een civiele procedure niet zonder meer ter zijde te worden geschoven;
- CRvB 13 september 2016, ECLI:NL:CRVB:2016:3479, *USZ* 2016/373, m.nt. M.W. Venderbos;
- CRvB 15 maart 2016, ECLI:NL:CRVB:2016:947, *USZ* 2016/165, m.nt. A. Moesker en I.A. Moesker, *Gst.* 2016/86, m.nt. R. Stijnen, *AB* 2016/329, m.nt. T. Barkhuysen en M.L. van Emmerik.

Zie anders:
- HR 11 juli 2014, ECLI:NL:HR:2014:1632, *RAV* 2014/89, *RAR* 2014/134, *Prg.* 2014/215;
- HR 18 april 2014, ECLI:NL:HR:2014:942, *RAV* 2014/69), *NJ* 2015/20.

Wenk:
De Centrale Raad van Beroep heeft in de onder 'Zie ook' genoemde uitspraken, in lijn

met de jurisprudentie van het EHRM, geoordeeld dat art. 53a lid 9 Wet Werk en Bijstand (WWB), thans art. 53a lid 6 Participatiewet, in samenhang met titel 5.2 Awb, onvoldoende wettelijke grondslag bieden voor heimelijke observaties van burgers/uitkeringsgerechtigden. De Centrale Raad oordeelt dat het aldus verkregen bewijs onrechtmatig verkregen is, en wel dat het verkregen is op een wijze die zozeer indruist tegen wat van een behoorlijk handelende overheid mag worden verwacht, dat gebruik hiervan ontoelaatbaar moet worden geacht. Zie voor nadere beschouwingen hierover de annotaties bij de genoemde uitspraken. Dit terwijl volgens de Hoge Raad in civiele zaken onrechtmatig verkregen bewijs niet zonder meer niet gebruikt mag worden. Volgens de Hoge Raad 'wegen in beginsel het algemene maatschappelijke belang dat de waarheid in rechte aan het licht komt, alsmede het belang dat partijen erbij hebben hun stellingen in rechte aannemelijk te kunnen maken, zwaarder dan het belang van uitsluiting van bewijs'. Slechts indien sprake is van bijkomende omstandigheden, is uitsluiting van dat bewijs gerechtvaardigd (zie onder 'Zie anders' HR 18 april 2014, ECLI:NL:HR:2014:942 en HR 11 juli 2014, ECLI:NL:HR:2014:1632).

De verwerking van persoonsgegevens, waar het Hof eveneens aandacht voor vraagt, is in Nederland geregeld in de Wet bescherming persoonsgegevens (Wbp).

De uitspraak van het Hof is van belang voor alle heimelijke observaties van burgers door overheidsorganen, in het bijzonder in het kader van verzekeringsgeschillen. In dit verband rijst de vraag of er in Nederland verzekeraars met privaatrechtelijke status bestaan die in het kader van de uitvoering van een wettelijk verplichte verzekering als overheidsorgaan worden aangemerkt. De Zorgverzekeringswet en de Wet aansprakelijkheidsverzekering motorrijtuigen bijvoorbeeld, kennen wettelijk verplichte verzekeringen. Zorgverzekeraars en WAM-schadeverzekeraars zijn privaatrechtelijke partijen. Zij worden echter volgens de heersende opvattingen niet aangemerkt als bestuursorganen in de zin van art. 1:1 lid 1 onderdeel b Awb ('met enig openbaar gezag bekleed'). Verzekeraars die zijn aangesloten bij het Verbond van Verzekeraars worden overigens wel geacht zich te houden aan de Gedragscode Persoonlijk Onderzoek (GPO) betreffende onderzoek dat inbreuk maakt of kan maken op de persoonlijke levenssfeer van betrokkenen.

Vukota-Bojić,
tegen
Switzerland.

Europees Hof voor de rechten van de mens:

Procedure

1. The case originated in an application (no. 61838/10) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') by a Swiss national, Ms Savjeta Vukota-Bojić ('the applicant'), on 14 October 2010.
2. The applicant was represented by Mr P. Stolkin, a lawyer practising in Zurich. The Swiss Government ('the Government') were represented by their Deputy Agent, Mr A. Scheidegger.
3. The applicant alleged, in particular, that the secret surveillance of her daily activities ordered by her insurance company had violated her rights under Article 8 and that the proceedings in her case had not been fair in breach of Article 6 of the Convention.
4. On 6 September 2013 the application was communicated to the Government.

The facts

I. The circumstances of the case
5. The applicant was born in 1954 and lives in Opfikon.
6. The applicant had been employed as a hairdresser since 1993 and she had compulsory accident insurance under the Federal Law on Accident Insurance (see Relevant domestic law below). On 28 August 1995 she was hit by a motorcycle while crossing the road and fell on her back. She was hospitalised overnight owing to suspected concussion resulting from the impact of her head against the ground.
7. On 2 October 1995 the applicant was examined by a rheumatologist who diagnosed her with a cervical trauma and possible cranial trauma. On 6 December 1995 her family doctor certified that her injuries had resulted in total incapacity for work until the end of the year.
8. On 29 January 1996 the applicant was examined at the Zurich University Hospital. The doctor who examined her predicted that she could make a gradual return to work. Nevertheless, on 12 June 1996 another doctor in the same hospital declared the applicant totally incapable of work.
9. At the request of her insurance company, the applicant's health was assessed by means of orthopaedic, neurological, neuropsychological and psychiatric examinations by the insurance-disability medical examination centre (COMAI) of St. Gallen. On the basis of the assessment carried out by that centre, the applicant was declared fully capable of work with effect from February 1997.

10. By a decision of 23 January 1997 the insurance company informed the applicant that her entitlement to daily allowances would end on 1 April 1997.

11. On 4 February 1997 the applicant submitted an objection to that decision and enclosed a report of a neurologist, who confirmed an almost permanent headache, limited head movement, pain radiation towards the shoulders and arms with sensory disorders as well as sleep disorders. In addition, the specialist suspected that the applicant had suffered whiplash and that she was affected by a neuropsychological dysfunction.

12. In September 1997 the insurance company rejected the applicant's complaint finding no causal link between the accident and her health problems.

13. The applicant appealed to the Social Insurance Court of the Canton of Zurich (*Sozialversicherungsgericht des Kantons Zürich*).

14. In a decision of 24 August 2000, the Social Insurance Court allowed the applicant's appeal. It overturned the insurance company's decision and remitted the case for further clarifications. Taking into account the partial contradictions that existed between the different medical reports, the court considered that the consequences of the accident for the applicant's state of health were not sufficiently established. Moreover, a doubt remained as to whether the applicant had suffered trauma to her neck and spine. The insurance company was thus required to clarify the issue.

15. The insurance company subsequently ordered a multidisciplinary examination, which was conducted by an institute of medical experts in Basel. In their report the experts concluded that the applicant was totally incapacitated in respect of the duties required in her profession. However, the insurance company challenged this report once it found that a doctor who had participated in its preparation had previously carried out a private examination of the applicant in the initial stages of the proceedings.

16. The insurance company therefore ordered another medical report, which was delivered on 11 November 2002. The report observed the existence of a causal link between the accident and the damage to the applicant's health, and was accompanied by a neuropsychological report, which noted a brain dysfunction subsequent to a head injury.

17. Meanwhile, by a decision of 21 March 2002 the competent social security authority (*Sozialversicherungsanstalt*) of the Canton of Zurich granted the applicant a full disability pension with retroactive effect.

18. Subsequently, the applicant asked the insurance company on several occasions to comment on its obligation to grant her insurance benefits.

19. On 5 October 2003 another expert report commissioned by the insurance company was prepared solely on the basis of the previous examinations. The medical expert confirmed the existence of a causal link between the accident and the applicant's health problems, and concluded that the applicant's illness had led to a total incapacity for work.

20. On 14 January 2005 the insurance company issued a decision confirming the termination of the applicant's benefits as of 1 April 1997. The applicant lodged a complaint against that decision.

21. On 11 June 2005, another independent physician concluded, solely on the basis of the previously drafted medical reports, that these medical findings were not sufficiently explicit as regards causality. According to him, the applicant's incapacity for work amounted to not more than 20%. He also strongly criticised the approach and findings of other medical experts. On the basis of this report, on 22 September 2005 the insurance company dismissed the applicant's complaint on the grounds of lack of a causal link between the accident and her medical conditions.

22. The applicant appealed, arguing that most of the medical reports had found a causal link and that the only report denying the existence of such a link was based solely on medical reports by other experts instead of on a direct examination.

23. On 28 December 2005 the Social Insurance Court recognised the existence of a causal link between the accident and the health problems the applicant complained of, and allowed her appeal. The matter was referred to the insurance company for it to decide on the right of the applicant to insurance benefits.

24. Thereafter, the insurance company invited the applicant to undergo a medical evaluation of her functional abilities, which she refused. The applicant was then issued with a formal notice within the meaning of Article 43 (3) of the Social Security Act inviting her to undergo the said evaluation and warning her about the legal consequences of failing to do so indicated in the said provision (see § 38 below). No mention of the possibility of covert monitoring was mentioned.

25. Thereafter, on 3, 10, 16 and 26 October 2006 the applicant was monitored by private investigators, commissioned by the insurance company. The surveillance was performed on four different dates over a period of twenty-three days and lasted several hours each time. The undercover investigators followed the applicant over long distances. Following the

surveillance, a detailed monitoring record was prepared. Pursuant to that report, the applicant appears to have become aware of the secret surveillance on the last day of implementation of the measure.

26. In a decision dated 17 November 2006 the insurance company refused the applicant's representative access to the surveillance report. The applicant then lodged a complaint with the supervisory authority, namely the Federal Office of Public Health, objecting to the failure to take a decision on her benefits entitlement.

27. On 14 December 2006 the insurance company sent the private investigators' report to the applicant. The report included the surveillance footage and declared that it considered it necessary to conduct a fresh neurological assessment of the applicant. However, the applicant refused to undergo any further examination and asked for a decision on her benefits to be taken.

28. In a decision of 2 March 2007 the insurance company again refused to grant any benefits to the applicant on the basis of the images recorded during the surveillance and her refusal to undergo a neurological examination.

29. The applicant lodged a complaint against that decision, claiming a pension on the basis of a degree of disability of 100% as well as compensation for damage to her physical integrity. She also asked for the surveillance case file to be destroyed.

30. On 12 April 2007 another neurologist appointed by the insurance company, Dr H., released an anonymous expert opinion based on evidence and drafted taking into account all the medical examinations and assessments carried out previously as well as the surveillance images. He found that the applicant's incapacity to work amounted to 10%. Furthermore, he estimated the damage to the applicant's physical integrity at between 5% and 10%. On the basis of the analysis of the surveillance images he concluded that the restriction on her capacity to lead a normal life was minimal.

31. On 14 March 2008 the Federal Office of Public Health gave the insurance company a deadline to decide the applicant's complaint. By a decision of 10 April 2008, the insurance company rejected the applicant's request for destruction of the images and decided to grant her daily allowances and a pension on the basis of a disability degree of 10%.

32. On 6 May 2008 the applicant lodged an appeal with the Social Insurance Court claiming compensation for damage to her physical integrity as well as a disability pension based on 70% disability. In addition, she claimed interest at 5% on arrears on the daily allowances remaining unpaid since the accident. She also asked for the expert opinion on the evidence taking into consideration the material resulting from the surveillance be to be removed from her case file. The applicant complained that the surveillance had been ‘reprehensible and inappropriate’ and had constituted an ‘attack on her personality’.

33. On 29 May 2009 the Social Insurance Court found in favour of the applicant. In particular, it ruled that owing to the lack of legal basis for the surveillance the monitoring record was not admissible as evidence. As a result, it denied any probative value of the expert opinion based on the evidence, which had taken into account the illegal surveillance. Moreover, according to the court's previous decision of 28 December 2005, the applicant was not required to undergo any further examinations. Therefore, she was entitled to refuse a medical assessment of her functional abilities.

34. The insurance company lodged an appeal against this decision before the Federal Court, criticising in particular the amount of benefits to be granted to the applicant.

35. In its judgment of 29 March 2010, of which the applicant was notified on 19 April 2010, the Federal Court ruled that, in accordance with its earlier jurisprudence (see below § 43), the surveillance of the applicant by private investigators had been lawful and the surveillance file was therefore a valid piece of evidence. After evaluating the surveillance file it found that the medical reports contradicted the images and videos showing the applicant walking her dog, driving a car long distances, going shopping, carrying groceries and opening the boot of the car by moving her arms above her head without noticeable restrictions or unusual behaviour. Moreover, it found that there were discrepancies, not only between the results of the surveillance and the medical reports but also between the medical reports which had been drafted before the surveillance. Finally, the examination of the applicant by a neurologist was necessary and admissible because she had previously refused to undergo an assessment of her functional capacities and a neurological examination, which were required in the circumstances. Accordingly, the Federal Court denied the probative value not only of the medical reports attesting to the applicant's complete incapacity to work but also of the reports attesting to her incapacity to work of a lesser degree. Therefore, the insurance company had acted correctly in ordering a reassessment of her ability to work through a critical review of all previous medical reports. Following an analysis of this expert opinion report based on evidence, the

Federal Court held that its findings were convincing. It quashed the decision of the Social Insurance Court, except for the considerations relating to the interest on arrears.

36. Subsequently the applicant lodged a request with the Federal Court for interpretation of its decision in the light of the established case-law concerning the probative value of the medical reports. The Federal Court dismissed her request, concluding that she had submitted her application not for the purposes defined in this legal remedy, but rather to argue a violation of Articles 6 and 8 of the Convention.

II. Relevant domestic law and practice

37. The relevant provisions of the Federal Constitution of the Swiss Confederation (classified compilation 101) read as follows:

Article 10 — Right to life and to personal freedom

"(…)

2 Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement (…)"

Article 13 — Right to privacy

"1 Every person has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications.

2 Every person has the right to be protected against the misuse of their personal data."

Article 36 — Restrictions on fundamental rights

"1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.

2 Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.

3 Any restrictions on fundamental rights must be proportionate.

4 The essence of fundamental rights is sacrosanct."

38. The relevant parts of the Federal Act on the General Part of Social Security Law (*Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts;* classified compilation 830.1; 'Social Security Act') read as follows:

Article 28 — Cooperation in the enforcement

"1 Insured persons and employers shall cooperate freely in the enforcement of the laws on social insurance.

2 Those who apply for benefits shall provide all information necessary to establish their rights and to assess the amount of benefits due.

3 Under specific circumstances the applicant is required to authorise all persons and institutions concerned, including employers, doctors, insurance companies and official bodies, to provide such information as may be necessary for the establishment of their entitlement to benefits. These individuals and institutions must provide the required information."

Article 43 — Application process

"1 The insurer shall examine requests, take of its own motion the necessary investigative measures, and collect necessary information. Information obtained orally must be issued in writing.

2 Insured persons must undergo such medical or technical examinations as may reasonably be required and are necessary for the assessment of their case.

3 If an insured person or other applicant unjustifiably refuses to perform their obligation to provide information or to cooperate in the process, the insurer can decide on the basis of the case file as it stands or close the investigation and decide not to address the merits of the case. In that event it must send them a written notice warning them about the legal consequences and providing them with an appropriate reflection period."

Article 55 — Special rules of procedure

"1 The procedural aspects that are not exhaustively regulated by Article 27–54 of this Act or by provisions of special laws are governed by the Federal Act of 20 December 1968 on administrative proceedings (…)"

Article 61 — Procedure

"With the exception of Article 1(3) of the Federal Act of 20 December 1968 on administrative proceedings, the proceedings before the Cantonal Insurance Court are regulated by cantonal law. They must satisfy the following requirements (…)

c. the court shall establish the facts relevant for the outcome of the case together with the parties; it shall manage the necessary evidence and assess it freely (…)"

39. The relevant provision of the Federal Act on Administrative Procedure (*Bundesgesetz über das Verwaltungsverfahren*; classified compilation 172.021; 'the Administrative Procedure Act') reads as follows:

Article 12

"*D. Establishing of the facts of the case*

I. Principles

The authority shall establish the facts of the case of its own motion and obtain evidence by means of the following:

a. official documents;

b. information from the parties;
c. information or testimony from third parties;
d. inspection;
e. expert opinions."

40. The relevant provisions of the Federal Act on Accident Insurance (*Bundesgesetz über die Unfallversicherung;* classified compilation 832.20; 'the Accident Insurance Act') read as follows:

Article 1a — Insured persons

"1 All persons employed in Switzerland, including home employees, apprentice trainees, trainees, and volunteers, as well as those working in protected technical schools or workshops, are compulsorily insured pursuant to the provisions of the present Act."

Article 58 — Categories of insurers

"Accident insurance is managed, by category of insured person, by the Swiss National Accident Insurance Fund (CNA) or by other authorised insurers and by a supplementary fund managed by the latter."

Article 68 — Categories and enrolment in the registry

"1. Those outside the competence of the CNA shall be insured against accidents by one of the companies indicated below:
a. private insurance companies subject to the Act of 17 December 2004 on insurance monitoring (LSA) (…)
2. Insurers wishing to participate in the management of compulsory accident insurance must be entered in a registry kept by the Federal Office of Public Health. This registry is public."

Article 96 — Processing of personal data

"The authorities in charge of implementing the present Act, or of assessing or monitoring its execution, are allowed to process and require to be processed personal data, including sensitive data and personality profiles, which are necessary in order to perform the tasks that are assigned to them by the present Act, in particular to:
a. calculate and collect payments;
b. establish rights to benefits, calculate, allocate and coordinate them with those from other types of social insurance (…)
e. monitor the execution of the present Act (…)"

41. The relevant provision of the Civil Code (classified compilation 210) reads as follows:

Article 28

"1 Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.
2 An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law."

42. The relevant provision of the Criminal Code (classified compilation 311.0) reads as follows:

Article 179quater

"*Breach of secrecy or privacy through the use of an image-carrying device*

Any person who observes with a recording device or records with an image-carrying device information from the secret domain of another or information which is not automatically accessible from the private domain of another,
any person who makes use of information or makes information known to a third party, which he knows or must assume has been produced as a result of an offence under paragraph 1 above,
any person who stores or allows a third party access to a recording that he knows or must assume has been made as the result of an offence under paragraph 1 above,
is liable on complaint to a custodial sentence not exceeding three years or to a fine."

43. The relevant parts of judgment 8C_807/2008 of the Federal Court dated 15 June 2009 (published as 135 I 169), the leading judgment concerning secret surveillance of an insured person ordered by the insurer, read as follows (*unofficial translation*):

"4.2 The respondent is an insurance company, which is registered as an authorised insurer in the Register for the implementation of compulsory accident insurance within the meaning of Article 68 UVG. As such, it is considered a public authority within the meaning of Article 1 § 2 (e) VwVG (…) To the extent that it can deliver binding decisions to insured persons, and thus exercises sovereign powers, it has to respect not only the procedural guarantees of administrative law, but also general constitutional principles, in particular fundamental rights (…).

4.3 The aim of surveillance of an insured person by private detectives is to collect and confirm facts which materialise in the public domain and may be observed by anyone (for example, walking, climbing stairs, driving, carrying loads or performing sports activities). Even when the surveillance is ordered by an authority, it does not give the person undertaking the surveillance the right to interfere with the privacy of the insured person. Unlike a judicially ordered surveillance – for instance, in the context of the Federal Act of 6 October 2000 on the Surveillance of Post and Telecommunications (BÜPF; SR 780.1) –

the protection of the insured person from crime remains intact, since private detectives acting on the strength of an administrative order are not allowed to commit criminal acts. In particular, the person in charge of the surveillance has to keep to the framework set up by Article 179quater of the Criminal Code. In contrast to a covert investigation pursuant to the Federal Law of 20 June 2003 on the undercover investigation (…) it is not the purpose of such surveillance for the investigating person to create links with the person subject to the surveillance so as to penetrate into their environment (…).

5.4 Given that, pursuant to Article 43 [of the Social Security Act] it is incumbent on the insurer to make the necessary clarifications, the said provision – at least in conjunction with Article 28 (2) [of the Social Security Act], which sets out a general obligation on the insured person to provide information – represents a basis for ordering surveillance. It must, however, be examined whether these provisions are sufficiently clear to serve as a legal basis within the meaning of Article 36 § 1 [of the Constitution].

5.4.2 Regular surveillance of insured persons by private detectives represents in any case a relatively minor interference with the fundamental rights of the individual concerned, in particular if it is limited to the area defined at point 4.3 [above] and thus restricted to the public space (…) Part of the literature represents the view that surveillance which is limited to such an extent does not even affect the scope of the fundamental right of privacy (*Ueli Kieser*, supra). The core content of Article 13 [of the Constitution] is not affected by the institution of such surveillance. In principle, information obtained from insured persons, their employers and healthcare professionals is sufficient for a reliable assessment of claims for benefits; further investigation by a private detective is indicated only in a vanishingly small percentage of persons registered with accident insurance cases (…) Ordering of secret surveillance is thus of an exceptional nature, as it will only take place if the other clarification measures fail to produce a conclusive result. The overall legal basis for the restriction of the fundamental rights of insured persons is thus sufficiently precise (…).

5.7 To sum up, it should be concluded that ordering surveillance of insured persons by accident insurers in the context outlined in point 4.3 [above] is permitted; the results of such surveillance can thus in principle be used for assessment of the issues in question (…) The probative value of the records and reports of private investigators can, however, only be granted in so far as they indicate activities and actions which the insured person has exercised without being influenced by those engaging in the surveillance (…).”

The law

I. Alleged violation of Article 8 of the Convention

44. The applicant complained that the domestic authorities had violated her right to respect for private life. In particular, she alleged lack of clarity and precision in the domestic legal provisions that had served as the legal basis of her surveillance. Article 8 of the Convention provides as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

45. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Acts imputable to the State

46. The surveillance measure complained of in the present case was ordered by a private insurance company. However, the said company has been given the right by the Federal Office of Public Health to provide benefits arising from compulsory insurance and to collect insurance premiums partly regulated by law. Under the jurisprudence of the domestic courts, such insurance companies are considered public authorities and are – at least in so far as they adopt binding decisions – obliged to respect the fundamental rights arising out of the Constitution (compare judgment of the Federal Court ATF 135 I 169, consid. 4.2).

47. The Court considers that the same must hold true for the Convention since, as it has already held, a State cannot absolve itself

from responsibility under the Convention by delegating its obligations to private bodies or individuals (see, among many other authorities, *Kotov v. Russia* [GC], no. 54522/00, § 92, 3 April 2012). Given that the insurance company was operating the State insurance scheme and that it was regarded by the domestic regime as a public authority, the company must thus be regarded as a public authority and acts committed by it must be imputable to the respondent State (see, *a contrario, De La Flor Cabrera v. Spain*, no. 10764/09, § 23, 27 May 2014).

2. Existence of an interference
(a) The parties' submissions

48. The applicant claimed that the systematic recording and storage or publication of images fell within the scope of Article 8. Even when the requirements for the protection of private sphere in a public space were less stringent, as in the case of a person of public interest, they could nevertheless not be unconcerned. In this regard, the Court should primarily consider whether the person involved could reasonably expect to enjoy the privacy afforded to the private sphere when moving in the public sphere (‘reasonable expectation of privacy’).

49. The applicant pointed out that she was systematically and intentionally followed and filmed by professionals specifically trained for this purpose, which, coupled with the storage and selection of the video material, constituted a serious interference with her right to respect for private life. The impact of the surveillance on her private life was evident in that the insurance company used those images in order to significantly reduce the amount of benefits she was entitled to receive.

50. The Government argued that the surveillance of the applicant was a measure of last resort of an exceptional nature. Under normal circumstances the information provided by the insured persons, their employer and doctors was sufficient to conduct a reliable assessment of an insurance benefit claim. Surveillance by a private investigator was requested only in a small proportion of cases when other measures of examination had proved inconclusive and the insured person had not fulfilled her or his obligation to provide the requested information. In these circumstances, surveillance aimed at systematically collecting and retaining data on facts that happened in the public arena and that anyone could note, for example the observed person's way of walking, climbing the stairs, driving, carrying loads or exercising.

51. In the Government's view, the surveillance of the applicant could thus only marginally have affected the scope of application of Article 8 of the Convention and did not constitute a serious infringement of her right to respect for private life. This, in turn, also relatively diminished the need for clarity and precision of the legal basis of the surveillance in question.

(b) The Court's assessment

52. The Court reiterates that ‘private life’ within the meaning of Article 8 is a broad term not susceptible of exhaustive definition. Article 8 protects, inter alia, a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life’ (see *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I; *Perry v. the United Kingdom*, no. 63737/00, § 36, ECHR 2003-IX (extracts); and *Köpke v. Germany* (dec), no. 420/07, 5 October 2010).

53. The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. This may include activities of a professional or business nature and may be implicated in measures effected outside a person's home or private premises (see *Peck*, cited above, §§ 57–58; *Perry,* cited above, §§ 36–37; and *Benediktsdóttir v. Iceland* (dec.), no. 38079/06, 16 June 2009).

54. However, the possibility cannot be excluded that a person's private life may be implicated in measures effected outside a person's home or private premises. A person's reasonable expectation as to privacy is a significant, although not necessarily conclusive, factor (see *Perry*, cited above, § 37).

55. In the context of monitoring of actions of an individual through the use of video or photographic equipment, the Court has held that the normal use of security cameras as such, whether in the street or on public premises, where they serve a legitimate and foreseeable purpose, did not raise an issue under Article 8 of the Convention (see *Perry*, cited above, § 38). However, private-life considerations may arise concerning recording of the data and the systematic or permanent nature of such a record (see *Peck*, cited above, §§ 58–59; and *Perry*, cited above, § 38).

56. Further elements which the Court has taken into account in this respect include the question whether there has been a compilation of data on a particular individual, whether there has been processing or use of personal data or whether there has been publication of the material concerned in a manner or degree

beyond that normally foreseeable (see *Uzun v. Germany*, no. 35623/05, § 45, ECHR 2010 (extracts)).

57. In a case concerning secret video recording of an employee at her workplace made on the instructions of her employer, the Court found that the covert video surveillance during some fifty hours, the recording of personal data, the examination of the tapes by third parties without the applicant's knowledge or consent, the use of the videotapes as evidence in the proceedings before the labour courts, and the domestic courts refusal to order the destruction of the tapes, had all seriously interfered with the applicant's right to privacy (see *Köpke,* cited above).

58. Turning to the present case, the Court must determine whether the use of the footage and images of the applicant in public spaces obtained by secret surveillance constituted processing or use of personal data of a nature to constitute an interference with her respect for private life. In that connection, the Court observes that the applicant was systematically and intentionally watched and filmed by professionals acting on the instructions of her insurance company on four different dates over a period of twenty-three days. The material obtained was stored and selected and the captured images were used as a basis for an expert opinion and, ultimately, for a reassessment of her insurance benefits.

59. By applying the principles outlined above to the circumstances surrounding the applicant's surveillance, the Court is satisfied that the permanent nature of the footage and its further use in an insurance dispute may be regarded as processing or collecting of personal data about the applicant disclosing an interference with her 'private life' within the meaning of Article 8 § 1.

3. Justification for the interference

60. The Court reiterates that any interference can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one or more of the legitimate aims to which paragraph 2 of Article 8 refers, and is necessary in a democratic society in order to achieve any such aim (see *Kennedy v. the United Kingdom*, no. 26839/05, § 130, 18 May 2010).

(a) The parties' submissions

61. The applicant argued that the surveillance had not been in 'accordance with the law'. In particular, the legal provisions on which the surveillance had been based were not sufficiently certain, precise or clear and thus not foreseeable as to their effects, in contrast to, for example, the domestic provisions regulating surveillance carried out by the police.

62. In fact, Articles 28 and 43 of the Social Security Act did not specify when, where and under what conditions surveillance was permissible, the time and length of surveillance measures, how the destruction of material obtained in this way was managed by the surveillance company, how the person monitored could complain about the surveillance and the destruction of the images, or how the person conducting the surveillance had to be trained. The law only vaguely defined that surveillance could be carried out when it seemed to be 'objectively justified', but did not specify this concept further. It follows that the law was not sufficiently clear for it to be 'foreseeable'.

63. The applicant further submitted that, according to domestic case-law, the conditions for a surveillance operation to be lawful were the high amount of the claim for damages and inconsistencies in the medical reports at hand. As to the first condition, surveillance would be permissible virtually any time that a victim of a traffic accident claimed a large amount in damages, which was usually the case. As to the second condition, the applicant pointed out that the findings of the medical reports did not depend on the victim of the accident, but on the medical experts in charge, who had often been commissioned by the insurance company itself.

64. The Government argued that the minor interference with the applicant's Article 8 rights had a basis in domestic law which was sufficiently foreseeable and accessible. In particular, the Federal Court repeatedly recognised that Article 43, read in conjunction with Article 28 (2) of the Social Security Act and Article 96 (b) of the Accident Insurance Act formed a sufficient legal basis for the surveillance of an insured person. The said provisions prescribed surveillance as a measure of last resort used when the insured person did not comply with her or his obligation to provide information requested and the insurance company had to process certain data necessary for it to perform the tasks assigned to it in domestic law. The law allowed the collection of data only in public spaces for a limited period of time and made it available only to a restricted number of persons.

65. Moreover, there were effective procedures guaranteeing the respect of the insured person's rights. According to the case-law of the Federal Court, the domestic law did not allow intrusion into the intimate sphere of the person being watched, or the commission of any punishable acts against him or her. Insured persons were protected against the abuse of surveillance measures by a number of