[NL] Unlawful allegations contained in investigative crime programme using hidden camera

IRIS 2020-10:1/10

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On 4 September 2020, the Rechtbank Amsterdam (District Court of Amsterdam) delivered an important judgment on the lawfulness of allegations contained in an investigative crime programme which targeted a private individual. The court laid down notable principles on the requisite factual basis for reporting serious allegations and on the use of hidden-camera footage by broadcasters, which has also been the subject of other recent rulings (see IRIS 2020-8/4).

The case arose in January 2018, when the commercial broadcaster SBS6 broadcast an episode of its investigative programme *Moord of zelfmoord* (*Murder or suicide*), involving a crime journalist investigating cases that had been classified as suicide by the Dutch police. The episode at issue concerned the death of a 46-year-old victim, who died in the summer of 2016 after falling from the window of his apartment, which was located on the third floor of a residence. The programme contained interviews with the victim's family, their lawyer, and a forensic investigator, who stated that there were indications that a struggle had taken place in the victim's room. The programme raised questions about the police's conclusion that the victim had committed suicide, and suggested that a second person may have been in the house. Crucially, the programme contained an interview with the victim's landlord, who, when asked by the presenter if anyone else had a key to the victim's apartment, stated that the victim's neighbour (the Claimant) may have had a key. The programme then showed blurred images from the Claimant's Facebook page, and included a segment where the presenter was shown confronting the Claimant, which was filmed using a hidden camera. The presenter asked the Claimant a series of questions about the victim's death. The Claimant's face is blurred in the footage, and he states that he was not home when the victim died, and that he did not have a key.

The episode was viewed by nearly 500 000 viewers, and following the broadcast, the Claimant initiated legal proceeding against SBS6, claiming that the programme had suggested his involvement in the victim's death, which was an unlawful violation of his rights to reputation and privacy. The court first noted that the case involved a clash between the broadcaster's fundamental right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), and the Claimant's right to protection of reputation and respect for private life under Article 8 ECHR. In order to determine whether the programme

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contained unlawful statements, the competing interests under Articles 10 and 8 had to be weighed up. Notably, the court stated that the broadcaster must be able to critically express itself and to bring abuses affecting society to the attention of the public. However, the court held that where journalistic research affects private individuals, who are subsequently identified, “appropriate caution must be exercised”. This is especially true when allegations of a criminal offence are made directly, or where involvement is implied. To what extent such statements are permitted depends to a large extent on the support they find in the available evidence.

The court then examined the programme in question, with the broadcaster arguing that the programme only included questions about the Claimant’s involvement, and made no direct accusations. However, the court held that the broadcaster had violated the Claimant’s privacy, as the programme had created the impression that the Claimant was the only possible suspect, presenting him as a serious suspect. It is important to note that the court disagreed with the broadcaster's assertion that the Claimant was unrecognisable, holding that the face-blurring was insufficient to make him unrecognisable, due to the fact that his manner of dressing remained visible, his voice was recognisable, and certain personal details were mentioned. Crucially, in relation to the use of a hidden camera to film the Claimant, the court held that this method of filming contributes to a particular image that is conveyed to the viewer, namely, the image of a (possible) suspect. In this sense, the use of this method of filming, as well as the act of blurring a face, has a “criminalising effect”. The court noted that interviews with other people in the programme had been filmed in a normal manner. The court concluded that there was insufficient support for the (suggestions of) allegations made against the Claimant, and made an order for damages and costs against the broadcaster for violation of privacy.

Rechtbank Amsterdam, 4 september 2020, ECLI:NL:RBAMS:2020:4247

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2020:4247

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