1982 November 12

[L. LOIZOU, STYLIANIDES, PIKIS, JJ.]

SYMEON GEORGHIOU,

Appellant-Plaintiff.

v.

ATTORNEY-GENERAL OF THE REPUBLIC,

Respondent-Defendant.

(Civil Appeal No. 6052).

Civil Wrongs Law, Cap. 148—*Section* 28—*Has no relevance to the liability of the State for acts of its servants—If at all relevant it comes in conflict with Article* 172 *of the Constitution.*

Constitutional Law—"Wrongful act or omission" and "exercise of duty" in the context of Article 172 *of the Constitution—Meaning* 5
—Liability of the State for acts of its officers—Relevance of section 28 *of the Civil Wrongs Law, Cap.* 148 *to the determination of the Liability of the State under Article* 172.

Damages—Exemplary damages—Employer—Liability to pay exemplary damages for unlawful acts of his servants—Principles applicable. 10

The appellant-plaintiff was on the 7th March, 1974 approached by two Police constables who asked him to follow them to the Police Station for the purpose of giving a statement; at the Police Station he was confronted by a team of police 15
constables who subjected him to a hostile interrogation with a view to elliciting whether he was a member of an anti government or illegal association or organization. While required to give a statement as to his connection with an unlawful organization, he was, in the process of interrogation, assaulted, 20
suffering, as a result, minor injuries that caused him damage, estimated by the trial Judge to range between £70.- and £80.- Notwithstanding the finding by the trial Court that the appellant was ill-treated while giving a statement, the trial Judge dismissed

his action for damages in view of the provisions of section 28* of the Civil Wrongs Law, Cap. 148 and in the absence of evidence that the Republic, as the master of the unidentified policemen who committed the assault had either expressly authorised or later ratified the trespass to his person.

Upon appeal by the plaintiff there arose, inter alia, the issue whether it was at all open to the State to restrict by law the liability created by Article 172** for wrongful acts of its servants, committed in the exercise or purported exercise of their duties.

Held, (1) that section 28 of Cap. 148 was incorporated in the statute in the context of the sum total of the provisions of the Civil Wrongs Law, including those of s.4(1), expressly prohibiting an action against the State for civil wrongs of its servants, since found unconstitutional (see *Kyriakides* case, 1 R.S.C.C. 66); that it does not aim to regulate liability under Article 172 for injurious unjust acts of the officers of the Republic committed in the exercise or purported exercise of their duties; that it has no relevance to the liability of the State for acts of its servants; that if s.28 is at all relevant, it comes in conflict with Article 172 to the extent that it limits the liability of the Republic for certain manifestly wrongful acts contrary to the very letter of the aforesaid article of the Constitution; that if s.28 was held to be reconcilable with the Constitution, it would open the door to the State, limiting its liability for a variety of wrongful acts, neutralizing thereby the mandatory provisions of the Constitution that make no distinction between the wrongful acts in the sense of Article 172 for which the State may be held liable; that, therefore, on either view of the law, s.28 has no bearing on this case.

Held, further (1) that the notion of "exercise of duty" in Article

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* Section 28 provides as follows:

"28. Notwithstanding anything contained in this Law, no principal or master shall be liable for any assault committed by his agent or servant against any other person unless he has expressly authorised or ratified such assault".

** Article 172 of the Constitution provides:

"172. The Republic shall be liable for any wrongful act or omission causing damage committed in the exercise or purported exercise of the duties of officers or authorities of the Republic.

A law shall regulate such liability".

172 is fairly straight forward; that it involves the execution of duties ordained by law, and covers cases of damage arising from the wrongful execution of their lawful duties whether intentional or accidental; that purported exercise of duty encompasses wrongful acts in the sense of Article 172, committed by officers or authorities of the Republic while professing or claiming to carry out duties associated with their office but not so in fact or law, in other words a case of abuse of office.

(2) That injurious act or omission is one that causes damage or produces adverse effects to the rights of the person affected thereby; that for the injurious act or omission to be actionable, it must be "ἄδικος"—unjust (wrongful). "Unjust" or "wrongful" in the context of Article 172, signifies an act committed without authority or justification in law; that the authority of officers of the State emanates from the law or laws setting up their office, defining their duties and regulating their discharge subject, always, to the fundamental provisions of the Constitution and notions of good administration; that *Abuse of authority or office lies* at the root of the liability of the Republic for acts or *omissions of its officers, both in the field of public as well as private law.*

(3) That article 172 lays down that the Republic is liable for the injury caused by the officer's wrongful act; "injury" in this sense, suggests loss and damage remediable by an appropriate award of damages restoratory of the rights of the injured party; that this is achieved by awarding compensation sufficient to achieve the above end; that the concept of exemplary damages imports an element of punishment directed against the wrongdoer; that there is, in principle, little room for punishing anyone for the unconstitutional acts of his employees; that if anything, the employer is himself the victim of such conduct by having to compensate those injured thereby; that only when the employer encourages the unlawful could one justify exemplary damages against one for the acts of his servant (see Harold Luntz in his work on the "Assessment of Damages" paras. 1220 and 1814); that, therefore, the Republic, in the absence of any suggestion that they encouraged the unlawful conduct of the policemen, if held responsible, they are only liable to compensatory damages between £70.– and £80.–.

(4) That the finding of the trial Court that the assault was

committed while the policemen were endeavouring to carry out their duty is not properly warranted by the evidence; and that, therefore, this factual issue will be remitted to the trial Court for retrial.

Appeal allowed in part.

Cases referred to:

Kyriakides v. *Republic*, 1 R.S.C.C. 66;

Vrahimi and Another v. *Republic*, 4 R.S.C.C. 121;

McCarthy's Limited v. *Smith* [1981] 1 All E.R. 111;

Attorney-General v. *Marcoullides and Another* (1966) 1 C.L.R. 242;

Gavris v. *Republic*, 1 R.S.C.C. 88;

Petrides v. *Greek Communal Chamber and Another* (1965) 1 C.L.R. 39;

Rookes v. *Barnard* [1964] 1 All E.R. 367;

Cassell & Co. Ltd. v. *Broome* [1972] 1 All E.R. 801;

Drane v. *Evanghelou* [1978] 2 All E.R. 437;

Papakokkinou v. *Gunther* (1982) 1 C.L.R. 65.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Ioannides, D.J.) dated the 11th December, 1979, (Action No. 1731/74) whereby his claim for damages as a result of ill-treatment whilst in police custody was dismissed.

A. Eftychiou, for the appellant.

S. Georghiades, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

L. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Pikis.

PIKIS J.: An important question of constitutional law must be decided in these proceedings, the nature and extent of the liability of the Republic for wrongful acts or omissions of its officers. Incidental to our decision is also the constitutionality of s.28 of the Civil Wrongs Law, limiting liability of a principal or master for assaults of a servant to assaults expressly authorised or subsequently ratified. More precisely, we must determine, in order to resolve the issue in dispute, whether it is at all open to

the State to restrict by law the liability created by Article 172 for wrongful acts of its servants, committed in the exercise or purported exercise of their duties.

The factual background to this appeal, as found by the trial Judge, but challenged before us on behalf of the respondent, can be summarised as follows:-

Symeon Georghiou, an employee of the Water department, the plaintiff-appellant before us, was, on 7th March, 1974, approached by two police constables who asked him to follow them to the police station, for the proferred purpose of giving a statement. He did as requested and accompanied the police constables to Paphos Gate police station, where he was confronted by a team of police constables who subjected him to a hostile interrogation with a view to eliciting whether he was a member of anti government or illegal association or organisation. While required to give a statement as to his connection with an unlawful organisation, he was, in the process of interrogation assaulted, suffering, as a result, minor injuries that caused him damage, estimated by the trial Judge to range between £70.- and £80.-. Notwithstanding this finding, resting on primary facts or inferences therefrom that appellant was ill-treated while giving a statement, the learned trial Judge dismissed the action in view of the provisions of s.28, Cap.148, and the absence of evidence that the Republic, as the master of the unidentified policemen who committed the assault, had either expressly authorised or later ratified the trespass to his person. This statement of the law was challenged on the submission that s.28 ceased to be part of our law, as from the introduction of the Constitution, so far as applicable to the Republic as principal, because it is contrary to and inconsistent with the provisions of Article 172 of the Constitution. Briefly, the submission is that s.28 ceased to be operative as respects the Republic as an employer, in view of the provisions of Article 188.1, saving only those pre-Constitution laws that are reconcilable with the Constitutional provisions, including Article 172. And given that Article 172 defines comprehensively the liability of the Republic for wrongful acts of its servants, independently of prior authorisation or subsequent ratification, any attempt to limit this liability, such as that made in s.28 - Cap.148, would be unconstitutional as a clear violation of the express provisions of Article 172.

Reference was made to two decisions of the Supreme Constitutional Court, notably *Phedias Kyriakides v. The Republic*, 1 R.S.C.C. 66, and *Eleni Vrahimi & Another v. The Republic*, 4 R.S.C.C. 121, shedding some light on the ambit of Article 172, and the nature of the liability of the State for wrongful acts of its officers or authorities of the State. Article 172 confers, it was held, an actionable right for wrongful acts of officers of the Republic, notwithstanding the absence of a law envisaged by Article 172, regulating the liability of the Republic in the area under consideration. Counsel for the Republic concurred to this view of the law, but, contrary to counsel for the appellant argued that the liability under Article 172 is subject to the provisions of Cap.148 defining tortuous acts until the enactment of the law envisaged by Article 172. The Civil Wrongs Law, to the extent that it was not irreconcilable with the provisions of Article 172, qualified as a law, regulating the liability of the Republic for wrongful acts of its servants. In his submission, the only direct effect of Article 172,was to do away with s.4(1) of the Civil Wrongs Law, barring proceedings against the State for the civil wrongs of its servants, a section of the law declared unconstitutional in the case of *Kyriakides*, supra. The nature of the liability of the State under Article 172, was the subject of a study by the learned Attorney-General, published in the *Cyprus Law Tribune* (see *Cyprus Law Tribune*, 5th year, Part 5 - 6), a study to which both counsel made reference. The author identifies the several aspects of the problem and suggests possible solutions.

It becomes necessary to examine closely in the first place, the wording of Article 172, especially in view of judicial pronouncements in *Kyriakides* and *Vrahimi*, supra, that it confers by itself, actionalbe rights. It is incontrovertible that in *Kyriakides*, the Supreme Constitutional Court took the view that the provisions of Article 172 are declaratory and definitive of the rights created thereunder, as to be capable of enforcement without further regulation. It is worthy of notice that the Court of Justice of the European Communities took a similar view of the provisions of Article 119 of the Treaty of Rome, prescribing equality in the sphere of social action, and held that an actionable right vested without further definition of the right in Municipal laws. (See, *McCarthy's Limited v. Smith* [1981] 1 All E.R. 111).

Article 172: Article 172 provides:-*

> " Ἡ Δημοκρατία εὐθύνεται διὰ πᾶσαν ζημιογόνον ἄδικον πρᾶξιν ἢ παράλειψιν τῶν ὑπαλλήλων ἢ ἀρχῶν τῆς Δημοκρατίας ἐν τῇ ἀσκήσει τῶν καθηκόντων αὐτῶν ἢ κατ' ἐπίκλησιν ἀσκήσεως τῶν καθηκόντων αὐτῶν. Ὁ Νόμος θέλει καθορίσει τὰ περὶ τῆς εὐθύνης τῆς Δημοκρατίας".

In the English text of the Constitution, the phrase "ζημιογόνος ἄδικος πράξις" does not literally reflect the Greek text unless the expression "wrongful act or omission", which is met in the English translation, is interpreted as a term of art encompassing, as the Greek text lays down, injurious unjust acts or omissions. Article 172 may appropriately be divided into three parts, considering the three themes it deals with. The part dealing with -

(a) the nature of the acts for which the Republic may be held liable,

(b) the extent of its liability, and, lastly,

(c) the need to regulate comprehently by law matters incidental to such liability.

Injurious unjust (*wrongful*) *act or omission* (*ζημιογόνος ἄδικος πράξις ἢ παράλειψις*) *in the context of Article* 172:

An injurious act or omission is one that causes damage or produces adverse effects to the rights of the person affected thereby. For the injurious act or omission to be actionable, it must be "ἄδικος" - unjust (wrongful). "Unjust" or "wrongful" in the context of Article 172, signifies an act committed without authority or justification in law. The authority of officers of the State emanates from the law or laws setting up their office, defining their duties and regulating their discharge subject, always, to the fundamental provisions of the Constitution and notions of good administration. *Abuse of authority or office lies* at the root of the liability of the Republic for acts or *omissions of its officers, both in the field of public as well as private law.* Liability attaches not only when the wrongful act occurs in the discharge of their duties but also in the course of the purported discharge of their duties. The relevant expression

* An English translation of Article 172 appears at p. 939 *ante*.

in the Greek text of the Constitution "κατ' επίκλησιν", imports liability whenever the wrong is done, by invoking the officer's powers. The word "purport", used in the English text, must be understood in this sense. "Κατ' επίκλησιν", connotes acts ostensibly or purportedly within an officer's authority, but not so in actual fact, as a matter of lawful authority. The State is similarly liable for wrongful acts committed because of misappreciation or misconception of an officer's duties arising from a bona fide mistake, as well as for acts or omissions involving a deliberate abuse of powers fraught with mala fides. In short, it covers acts seemingly attributable to the authority of the actor's office but outside the realm of his authority, as defined by law.

The liability of the State under Article 172 extends to wrongful acts or omissions committed or suffered in the domain of both public as well as private law, subject to this qualification. Where the wrongful act is committed in the field of public law, its annulment under Article 146 is a prerequisite to a civil action under Article 146.6 of the Constitution. (See, *Kyriakides,* supra, and *The Attorney-General v. A. Marcoullides and Another* (1966) 1 C.L.R. 242). The investigation of crime, as well as the action of the police, relevant thereto, are acts not cognisable under Article 146 because of their close association with the criminal process and judicial proceedings that may follow (see, *Andreas N. Gavris v. The Republic,* 1 R.S.C.C. 88, and *Phedias Kyriakides v. The Republic,* 1 R.S.C.C. 66). Hence, wrongful acts or omissions in this area may be the subject of an action before a civil court.

The authority and duties of members of the police force are defined by the Police Law, Cap.285, and Regulations made thereunder. Nowhere do they warrant or permit the use of force in the discharge of their duties. Nor could, the grant of such power, be reconciled with the basic provisions of the Constitution safeguarding fundamental human rights, including security of person and physical integrity (see Articles 8 and 11.1 of the Constitution).

The law that may regulate civil liability under Article 172:

The Constitution envisages the enactment of a law regulating

the liability of the State. The existence of the right is not conditioned on the enactment of any law but its exercise may be controlled by law. The control is incidental to the presence of the constitutional right and subject to it. An example of this control is furnished by the enactment of s.57 of Law 14/60, providing that proceedings against the Republic may be instituted by suing the Attorney-General (*Kyriakides,* supra). But no law can limit the ambit or scope of the right. That would be unconstitutional, because Article 172 is definitive of the liability of the State, as well as the rights of a party injured as a result of acts for which the State is liable in accordance with its provisions. Article 172 does not make the presence of liability of the State dependent on the enactment of a law. Such liability is clearly and succinctly defined by the Constitution itself. No law can derogate therefrom. Consequently, the power of the State to regulate such liability is limited to matters incidental to the existence of State liability, such as the measure of damages, the burden of proof and other procedural matters associated with the exercise of the right. To the extent that Cap.148 regulates the establishment of liability at civil law, it may be legitimately regarded as a legislation regulating State liability but always subject to Article 172 and lack of freedom of the State to limit the extent of the right. What is certain, is that the liability of the State under Article 172 is not co-extensive or co-incidental with the liability of a master for the wrongs of his servants under Cap.148. Liability under Cap.148 is not a pre-requisite for liability under Article 172. The liability of the State under Article 172 is pre-eminently a species of public law liability, whereas liability under Cap. 140 lies primarily in the filed of private law.

The policy of the law: The approach elicited in this judgment, is consonant with a proper application of the concept of the rule of law and the vigilance expected of the State to ensure that its officers operate strictly within the limits of their authority and always for the purpose of advancing the wider aims of the law, requiring a healthy and just administration.

The liability of the State for acts of its officers and State authorities in contemporary jurisprudence:

Stassinopoulos, in his work on the *Civil Liability of the State,*

makes an interesting and revealing study of the European juridical history on the subject of State liability for acts of its organs and the evolution that took place over the years. (See, pp. 12 - 19, 26, 87- 91 and p.111; see also *Kyriacopoulos* - Greek *Administrative Law* - Vol. 2, pp. 474- 475). We may, with benefit, recite in brief, the principal stages of this evolutionary process. What emerges from this historical study of State liability for acts of its organs and officers, is that liability is invariably dependent on what the State, as an organic entity, is regarded as representing or personifying. It mirrors the process of development towards achieving effective democratic institutions.

At first, the State was treated as immune from liability for acts of its servants. The State was not identified as an expression of the will of the people, nor was it regarded as impersonally expressing their will. The head of the State, usually a king or a queen, governed as of right, and the precept that the king can do no wrong, found due expression in the law. At that early era the State was beyond the control of the people and, neither legally nor politically answerable to them.

The second stage of development was reached when State liability was recognised subject to the rules of private law. The State was assimilated in regard to its servants to a private employer. Behind this equation lied the belief that top administrators exercised similar powers to employees, dividing thereby public servants into categories, depending on the powers exercised. This theory took no stock of the fact that all public servants, whether high or low in the hierarchical ladder, have a similar duty to apply the law, each at his station, in the interests of legality and sound administration. Public administration is not the exclusive business of any individual but the collective responsibility of the Government as an institution of the State. Their authority derives from the law and from the law alone.

In the third and final stage of development, the liability of the State for acts of its officers and organs, is defined, independently of rules of private law, as a species of public law liability. This approach gained roots from the recognition of the fact that law

is supreme, and that it is the duty of the rulers to give full effect to the law as a fundamental aspect of their mandate to rule. The supremacy of the law, requiring equal obedience by all, by the governed and the governors, alike, helped to shape modern conceptions of liability of the State for acts of its servants. Liability arises from refusal, failure or omission to implement the law, or abuse of its provisions. The precept of democracy that government is for the people, lies at the core of State liability for acts of its officers, ultimately the servants of the public. Consequently, liability arises whenever the administration defaults in the discharge of its mission under the law, and as a result damage is caused to the citizen. In Cyprus, where, as in the continent of Europe, there is a sharp cleavage between public and private law, it is essential to have regard to this historical perspective for a proper appreciation of State liability under Article 172.

In *Pantelis Petrides* v. *The Greek Communal Chamber and Another* (1965) 1 C.L.R. 39, there are dicta supporting the interpretation asserted in this judgment to Article 172. They support that—

(a) Articles 146.6 and 172 are designed to regulate the liability of the State for wrongful acts of its servants in the domain of public law, and that

(b) a fundamental objective of Article 172 is to ensure legality in the field of public administration.

The relevance and applicability of s.28 of Cap. 148 to the determination of the liability of the State under Article 172:

Section 28 of the Civil Wrongs Law, limiting liability of a master or principal for assaults of his servants to cases of express authorisation or subsequent ratification, derives its origin from the Palestine Ordinance. It found its way in the Civil Wrongs Code in 1953. In our judgment, it is irrelevant to the determination of the liability of the State for assaults committed by officers of the Republic, for the following reasons:

Section 28 was incorporated in the statute in the context of the sum total of the provisions of the Civil Wrongs Law, including those of s.4(1), expressly prohibiting an action against the State

for civil wrongs of its servants, since found unconstitutional (see *Kyriakides*, supra). It does not aim to regulate liability under Article 172 for injurious unjust acts of the officers of the Republic committed in the exercise or purported exercise of their duties. In short, it has no relevance to the liability of the State for acts of its servants. If s.28 is at all relevant, it comes in conflict with Article 172 to the extent that it limits the liability of the Republic for certain manifestly wrongful acts contrary to the very letter of the aforesaid article of the Constitution. If s.28 was held to be reconcilable with the Constitution, it would open the door to the State, limiting its liability for a variety of wrongful acts, neutralizing thereby the mandatory provisions of the Constitution that make no distinction between the wrongful acts in the sense of Article 172 for which the State may be held liable. So, on either view of the law, s.28 has no bearing on this case.

The facts relevant to the assault: The judge found that the plaintiff suffered the minor injuries he complained of in the hands of the police and that members of the police force assaulted him and inflicted upon him the injuries sustained. This finding cannot be disturbed. There is ample evidence to support it. It is sustained.

The evidence of the plaintiff on the identity of his assailants was found by the Court to be unreliable. That could not change the liability of the Republic given that the assault was committed by members of the police force, be it unidentified. What had to be established was whether the assault was committed in the exercise or purported exercise of their duties. The notion of "exercise of duty" is fairly straight forward. It involves the execution of duties ordained by law, and covers cases of damage arising from the wrongful execution of their lawful duties whether intentional or accidental. Purported exercise of duty encompasses wrongful acts in the sense of Article 172, committed by officers or authorities of the Republic while professing or claiming to carry out duties associated with their office but not so in fact or law. In other words a case of abuse of office.

The learned judge in this case held that but for the provisions of s.28—Cap. 148, he would have adjudged the Republic to

pay damages for the unlawful acts of members of the police force, on the ground that the assault was committed in the course of taking a statement. What the trial judge said, is that the assault was committed in the course of exercising their duties. The damages were estimated between £70.– and £80.–, a fair assessment having regard to the injuries sustained but would be disposed to hold, had they been answerable in damages, the Republic liable to pay exemplary damages put at £500.–.

Damages: The trial judge estimated the damage suffered by the appellant to range between £70.– and £80.–. Notwithstanding the inclusion, in the notice of appeal, of a point challenging the propriety of the award, allegedly low, the matter was not pressed before us. Rightly so for, having regard to the injuries suffered, the estimated compensation was fair and adequate. The culprits would, if personally sued, be liable to exemplary damages because servants of the State, guilty of oppressive or unconstitutional conduct in abuse of their powers, are liable to exemplary damages. (See, *Rookes* v. *Barnard* [1964] 1 All E.R. 367; *Cassell & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801; *Drane* v. *Evanghelou* [1978] 2 All E.R. 437; *Papakokkinou* v. *Gunther* (1982) 1 C.L.R. 65). That does not solve the problem for there is nothing in Article 172 to suggest that the liability of the State is necessarily co-extensive with that of the wrongdoer. Article 172 lays down that the Republic is liable for the injury caused by the officer's wrongful act. "Injury" in this sense, suggests loss and damage remediable by an appropriate award of damages restoratory of the rights of the injured party. This is achieved by awarding compensation sufficient to achieve the above end. The concept of exemplary damages imports an element of punishment directed against the wrongdoer. There is, in principle, little room for punishing anyone for the unconstitutional acts of his employees. If anything, the employer is himself the victim of such conduct by having to compensate those injured thereby. Only when the employer encourages the unlawful could one justify exemplary damages against one for the acts of his servant. This view is shared by Harold Luntz in his work on the "Assessment of Damages" (see paras. 1220 and 1814). Therefore, the Republic, in the absence of any suggestion that they encouraged the unlawful conduct of the policemen, if held responsible,

they are only liable to compensatory damages between £70.– and £80.–. But has liability been proved?

The facts relevant to liability: The finding that the assault was committed while the policemen were taking a statement from the appellant, i.e. while endeavouring to carry out their duty, is not properly warranted by the evidence of the appellant, the only witness who testified on the circumstances of the assault. The judge came to this view without a proper evaluation of the circumstances surrounding the assault, as the case revealed by the printed record. Nothing that is said here should be construed as suggesting that the evidence before the trial Court could not, on a proper evaluation, result in a finding that the assault was committed while the members of the police involved purported to exercise their duties. That evaluation, however, is the province of the trial Court, not the task of the Supreme Court. Therefore, after a thorough debate of the subject among us, we have decided to remit this factual issue for retrial and we so order. The remaining facts are sustained, i.e. that appellant was assaulted by members of the police force at Paphos Gate police station and that his damage amounts to £75.–. The trial Court must resolve the factual issue, whether the assault was committed by the police in the purported exercise of their duties, guided by the principles expounded in this judgment.

In the result, the appeal is allowed in part. The case is remitted for retrial of the issue specified in this judgment.

Appellant is entitled to his costs on appeal but costs before the trial Court will be costs in the cause.

Appeal partly allowed. Order for costs as above.