

CAROLINE CHISHOLM: THE CARTHAGINIAN CASE AND PRIVATE PROSECUTIONS IN MID-NINETEENTH CENTURY NEW SOUTH WALES

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I THE CARTHAGINIAN CASE

Throughout her time in Australia, Caroline Chisholm assisted thousands of immigrants upon their arrival and settlement in New South Wales, particularly women; a demographic exposed to severe hardships in the colonial state.¹ Thus in 1842, upon hearing of the maltreatment² suffered by Margaret Ann Bolton on board the immigrant ship *Carthaginian*, Chisholm was determined to see justice. She approached Governor Gipps, and insisted that action be brought against the alleged perpetrators, Robert Robertson and Richard William Nelson.³ The Governor warned her that a government prosecution was a serious matter, to which Chisholm adamantly responded, “I am ready to prosecute: I have the necessary evidence, and if it be a risk whether I or these men shall go to prison, I am ready to stand the risk.”⁴ Had Governor Gipps denied her request for a government prosecution, Chisholm was prepared to undertake a private prosecution.⁵ However, whilst her readiness to initiate proceedings is admirable, questions arise as to whether private prosecutions were in fact actionable in mid-nineteenth century Australia, and if so, whether Chisholm faced dire consequences in the event of a failed prosecution.

II EXISTENCE OF PRIVATE PROSECUTIONS

Private prosecutions in England, during the eighteenth and early nineteenth centuries, were crucial to the administration of criminal justice, as a system of public prosecutors had not yet been established.⁶ The individual citizen as a crime victim was expected to carry out the investigation, apprehend the suspect, and conduct the actual prosecution in court, either personally, representatively⁷ or by engaging legal counsel.⁸ Australia however, as a British

¹ Margaret Kiddle, *Caroline Chisholm* (Melbourne University Press, abridged ed, 1969) 52.

² Margaret Ann Bolton was reportedly dragged up onto deck, handcuffed, cold water thrown over her, before being left exposed to the weather for hours until she was unable to walk by herself. For further details of the mistreatment, see: ‘Ill Treatment of Immigrants’, *The Australasian Chronicle* (Sydney) 17 February 1842, 3; ‘Ill Treatment of Immigrants’, *The Sydney Herald* (Sydney) 23 April 1842, 2.

³ Samuel Sidney, *The Three Colonies of Australia* (Ingram, Cooke and Co, 2nd ed, 1853) 112.

⁴ *Ibid.*

⁵ Rodney Stinson, *Unfeigned Love: historical accounts of Caroline Chisholm and her work*, (Yorkcross, 1st ed, 2008) 153; Fortunately, the undertaking of a private prosecution was never required, as the captain and surgeon were tried and found guilty of assault. The men were sentenced to six months imprisonment, and fined £50.

⁶ David Plater, *The Changing Role of the Modern Prosecutor: Has the Notion of the ‘Minister of Justice’ Outlived its Usefulness?* (PhD Thesis, University of Tasmania, 2011) 28; A system of public prosecution was first instituted in England during the late-nineteenth century; however, prior to this development, the *Metropolitan Police Act 1829* allowed for the police to initiate proceedings against the accused for public order and vagrancy offences, facilitating the gradual assumption of prosecutions by the police force throughout the nineteenth century: Clive Emsley, *Crime and Society in England, 1750-1900* (Routledge, 4th ed, 2013) 188-226.

⁷ The crime victim could of course draw upon the assistance of family or friends as representatives to conduct proceedings on their behalf. See, for example: *MacDowell v MacDougall* (Unreported, Quarter Sessions, Hone, Kerr, Dunn J, 16 November 1841).

settlement, never acquired the same prominence of private prosecutions, where from the outset prosecutions were largely brought on a public basis.⁹ Nonetheless, there does appear to be a number of cases where private prosecutions were authorised in mid-nineteenth century New South Wales;¹⁰ the period and location in which Chisholm sought to initiate proceedings. Through examination of such cases, the likelihood of Chisholm successfully undertaking a private prosecution may be ascertained.

A *MacDowell v MacDougall* (1841)

*MacDowell v MacDougall*¹¹ was a case heard in the New South Wales Quarter Sessions in 1841, whereby MacDowell appeared for his brother as the private prosecutor. The defendant was accused of striking the victim numerous times with a dog whip, and hence the matter was an indictment for assault. The case is significant for the Chisholm suit, as it demonstrates the possibility for criminal assault to be actioned as a private prosecution during the mid-century. Therefore, were Chisholm to privately initiate proceedings against Robertson and Nelson, the matter would also be brought as an indictment for assault, as the alleged perpetrators were accused of dragging Bolton up onto deck, handcuffing her, throwing cold water over her, before leaving her exposed to the weather for hours.¹² Considering the evidence gathered by Chisholm, including a witnessed admittance to the accusations by Robertson and Nelson,¹³ it is likely that both men would be found guilty in a private prosecution, and a sentence passed similar to that which was delivered in the government trial; namely, six months imprisonment and a £50 fine.¹⁴

⁸ Chris Corns, 'Police Summary Prosecutions: the Past, Present and Future' (Paper presented at the History of Crime, Policing and Punishment Conference, Canberra, 9-10 December, 1999) 2.

⁹ David Plater, *The Changing Role of the Modern Prosecutor: Has the Notion of the 'Minister of Justice' Outlived its Usefulness?* (PhD Thesis, University of Tasmania, 2011) 92; One reason that prosecutions were largely brought on a public basis in the colonial state was due to the corruption and disloyalty that plagued the private prosecutorial system, whereby common informers split rewards for turning in offenders: G. D. Woods, *A history of criminal law in New South Wales: the colonial period, 1788-1900* (The Federation Press, 2002) 192; Another reason for public prosecutions was that the common law system of presentment by grand jury and trial by jury were deemed unsuitable for the colony, with the Attorney-General being appointed the role of presentment of offences for indictment: Michael Rozenes QC, 'Prosecutorial Discretion in Australia today' (Paper presented at the Australian Institute of Criminology Conference, Melbourne, 18-19 April 1996) 3.

¹⁰ One private prosecution was the criminal trial of two men, Nichols and Dobson, who were both found guilty of conspiracy, and sentenced to 2 years imprisonment, with respective fines of £250 and £500: 'Supreme Court', *Sydney Monitor*, 31 August 1836, 2; Another private prosecution was the trial of defendant Mary Gorman as a common scold and nuisance. The matter was brought at the suit of Thomas Ryan; however, the case was ultimately dismissed: 'Maitland', *Sydney Monitor and Commercial Advertiser*, 7 June 1839, 2; A third private prosecution was that brought by the Police Office against Mahoney for disturbing the peace. However, once more, this case was also dismissed: 'Local News', *The Australian*, 6 June 1839, 2; Other notable private prosecutions include: *MacDowell v MacDougall* (Unreported, Quarter Sessions, Hone, Kerr, Dunn J, 16 November 1841) and *R v McDermott* (1841) NSWSupC 101.

¹¹ *MacDowell v MacDougall* (Unreported, Quarter Sessions, Hone, Kerr, Dunn J, 16 November 1841).

¹² 'Ill Treatment of Immigrants', *The Australasian Chronicle* (Sydney) 17 February 1842, 3.

¹³ Margaret Kiddle, *Caroline Chisholm* (Melbourne University Press, abridged ed, 1969) 53; 'Ill Treatment of Immigrants', *The Sydney Herald* (Sydney) 23 April 1842, 2.

¹⁴ *R v Robertson* (1842) NSWSupC 44.

B *R v Horan* (1828)

*R v Horan*¹⁵ was another case heard in the Supreme Court of New South Wales in 1828, of which involved several petitions for pardon. Whilst the matter was not a private prosecution, the Attorney-General appeared in his private capacity, illustrating the typicality of government prosecutors acting on behalf of their own private legal practice.¹⁶ This feature would have been most significant for the success of Chisholm's prosecution, as in 1842, Roger Therry was the acting Attorney-General, a man that retained a private legal practice,¹⁷ and with whom, most importantly, Chisholm was well acquainted.¹⁸ Therefore, in the event that Governor Gipps had denied her request for a police investigation, Chisholm could potentially have appealed to Roger Therry to initiate proceedings privately, further maximising the chances of a successful prosecution.

III CONSEQUENCES OF PROSECUTORIAL FAILURE

Whilst a private prosecution of Robertson and Nelson would most likely have been successful given the strong evidence against the accused,¹⁹ failure to prove the charges in court was potentially a very real prospect for Chisholm, as shown from her readiness to face imprisonment.²⁰ Historically, however, it appears that Chisholm was mistaken, as imprisonment was not a likely consequence for failing to prove charges in court.²¹ Rather, pecuniary damages was a more likely consequence for Chisholm, but only in the event that Robertson and Nelson undertook a successful counter action in the tort of malicious prosecution.²² For the suit to be successful, the complainants would have been required to prove that the indictment caused by Chisholm was preferred maliciously, and without

¹⁵ *R v Muldoon, Bolton, McKoldrick, McMoren and Horan* (1828) NSWSupC 44.

¹⁶ David Plater, *The Changing Role of the Modern Prosecutor: Has the Notion of the 'Minister of Justice' Outlived its Usefulness?* (PhD Thesis, University of Tasmania, 2011) 92-93.

¹⁷ David Clune, '1843: The year it all began' (2011) 26(1) *Australasian Parliamentary Review*, 26.

¹⁸ The relationship between Caroline Chisholm and Sir Roger Therry appears to be one of close acquaintance. Chisholm dined with the Therrys in their home on a number of occasions, her friendship with Mrs. Therry further supporting such an acquaintance: Mary Hoban, *Fifty One Pieces of Wedding Cake: A Biography of Caroline Chisholm* (Lowden Publishing Co, 1973) 28, 66, 114-115. Furthermore, Roger Therry regarded himself as a 'frequent eye-witness to her activities', expressing a highly-esteemed praise of Chisholm's work for the female immigrants upon their arrival in the colony during the mid-century: Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (Sampson Low, Son and Co, 1863) 416-421.

¹⁹ For a detailed outline of the evidence against Robertson and Nelson, see: 'Ill Treatment of Immigrants', *The Australasian Chronicle* (Sydney) 17 February 1842, 3; 'Ill Treatment of Immigrants', *The Sydney Herald* (Sydney) 23 April 1842, 2.

²⁰ Samuel Sidney, *The Three Colonies of Australia* (Ingram, Cooke and Co, 2nd ed, 1853) 112.

²¹ Imprisonment was not a likely consequence for failure to prove charges in court, as the nature of the penalty was criminal. The tort of malicious indictment was a civil action, meaning that strictly civil penalties could be imposed, such as damages. It was possible for a criminal action to be brought in the form of conspiracy to prefer a malicious indictment; however, such an action was strictly limited, expensive, and required a higher standard of proof. The action was therefore almost never used, as the tort of malicious prosecution had a much higher rate of success: Douglas Hay, *Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850* (Oxford University Press, 1989) 350.

²² During the eighteenth century, judges made it very difficult for complainants to sue for malicious prosecution, as it dissuaded legitimate actions from being brought to court. However, during the early nineteenth century, the strict procedural rules and substantive requirements for the action began to be weakened, and a more generous grant of damages began to be awarded, giving rise to an increase in the number of actions brought for malicious prosecution: Douglas Hay, *Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850* (Oxford University Press, 1989) 377-389.

reasonable or probable cause.²³ Consequently, at the time of initiating proceedings against Robertson and Nelson, Chisholm was exposed to the risk of countersuit for malicious prosecution, carrying the penalty of damages. The amount of damages likely to be incurred is determinable by reference to a similar case.

A *Tolman v Kelly* (1839)

*Tolman v Kelly*²⁴ was a case heard in the Supreme Court of Van Diemen's Land in 1839, and involved an action for malicious prosecution. The defendant was charged with accusing the plaintiff of assault, of which had caused a police warrant to be issued, resulting in the plaintiff being imprisoned for some time. The jury determined that the defendant was guilty, and he was subsequently ordered to pay £70 damages. Similar circumstances arose in the *Carthaginian* case, whereby Chisholm accused Robertson and Nelson of assault, a warrant was issued against them, and they were subsequently imprisoned for a period of time.²⁵ Therefore, in the event that the accused were acquitted, and successfully mounted an action for malicious prosecution against Chisholm, it is likely that she would have been ordered to pay damages, estimable to the amount of £70.

IV SELFLESS LEGACY

Caroline Chisholm's active participation in the *Carthaginian* case of 1842 was crucial to setting a landmark precedent against the mistreatment suffered by immigrants on board the voyage ships during the nineteenth century.²⁶ Her desire to see the offenders brought to justice is apparent from her willingness to undertake a private prosecution against Robertson and Nelson, despite such an action being entirely uncommon for the time period.²⁷ The consequences of a failed prosecution, furthermore, do not appear to have fazed Chisholm; she was prepared to face imprisonment had she failed to prove the charges in court,²⁸ although in that event of malicious prosecution, damages was the most likely consequence.²⁹ Nonetheless, labelled by Sir Roger Therry as one of the most important colonial decisions in the nineteenth century,³⁰ the *Carthaginian* case testifies to the extraordinary work of Caroline Chisholm for immigrant welfare in the colonial state, furthering a legacy of unmarked selflessness.

²³ Douglas Hay, *Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850* (Oxford University Press, 1989) 349.

²⁴ *Tolman v Kelly* (1839) TASSupC 40.

²⁵ Margaret Kiddle, *Caroline Chisholm* (Melbourne University Press, abridged ed, 1969) 53.

²⁶ *Ibid.*

²⁷ David Plater, *The Changing Role of the Modern Prosecutor: Has the Notion of the 'Minister of Justice' Outlived its Usefulness?* (PhD Thesis, University of Tasmania, 2011) 92.

²⁸ Samuel Sidney, *The Three Colonies of Australia* (Ingram, Cooke and Co, 2nd ed, 1853) 112.

²⁹ Douglas Hay, *Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850* (Oxford University Press, 1989) 350.

³⁰ Mary Hoban, *Fifty One Pieces of Wedding Cake: A Biography of Caroline Chisholm* (Lowden Publishing Co, 1973) 87.

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