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Safe at Home: Protecting Female Tenants from Violence

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Abstract

This article deals with the tension for legal aid clinics between a policy of not representing landlords and a policy of acting for abused women rather than their alleged abusers. Many women face violence where they live, which can jeopardize their tenancies. To combat the resulting legal problems effectively, clinics may need to work indirectly or even directly for landlords. Clinics ought also to consider lobbying for changes to legislation to allow tenants to take action directly against other tenants who threaten their safety. Parkdale Community Legal Services (PCLS), which led the way for other clinics in their adoption of both policies has, more recently, been considering broadening its violence policy. The author urges PCLS and other clinics to look carefully at the situation of female tenants at risk of violence and adapt their case criteria to better meet these womens' needs.

Keywords

Parkdale Community Legal Services; Legal aid; Legal assistance to women; Women–Violence against; Landlord and tenant; Canada

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SAFE AT HOME: PROTECTING FEMALE TENANTS FROM VIOLENCE[©]

BY LORI A. POPE*

This article deals with the tension for legal aid clinics between a policy of not representing landlords and a policy of acting for abused women rather than their alleged abusers. Many women face violence where they live, which can jeopardize their tenancies. To combat the resulting legal problems effectively, clinics may need to work indirectly or even directly for landlords. Clinics ought also to consider lobbying for changes to legislation to allow tenants to take action directly against other tenants who threaten their safety. Parkdale Community Legal Services (PCLS), which led the way for other clinics in their adoption of both policies has, more recently, been considering broadening its violence policy. The author urges PCLS and other clinics to look carefully at the situation of female tenants at risk of violence and adapt their case criteria to better meet these women's needs.

Cet article traite du dilemme auquel sont confrontées les cliniques d'aide juridique en raison d'une part, d'une politique de non-représentations des propriétaires et, d'autre part, d'une politique de représentation des femmes victimes de violence plutôt que de leurs présumés agresseurs. Plusieurs femmes sont victimes de violence là où elles habitent, ce qui peut compromettre leur contrat de bail. Pour tenter de résoudre efficacement les problèmes juridiques qui découlent de cette situation, les cliniques peuvent être appelées à travailler indirectement, voire directement, pour les propriétaires. Les cliniques devraient également envisager la possibilité de faire des pressions afin d'obtenir des changements législatifs qui permettraient aux locataires de prendre des mesures directement contre d'autres locataires qui menacent leur sécurité. *Parkdale Community Legal Services* a joué un rôle de chef de file dans l'adoption de ces deux politiques et a récemment songé à élargir sa politique en matière de violence. L'auteur presse PCLS et les autres cliniques à examiner attentivement la situation des femmes locataires qui risquent de subir de la violence et à ajuster les critères d'accessibilité de leurs services de façon à mieux répondre aux besoins de ces femmes.

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* Review Counsel and Co-director, Legal Clinic, Faculty of Law, University of Ottawa. The author thanks David Bennett for his support and helpful suggestions for this paper. Professor Mary Jane Mossman was also very helpful in the development of an earlier version of this article, presented at the Violence Against Women workshop of PCLS's "Poverty Law Theory, Poverty Law Practice" conference. The workshop participants' comments and discussion were invaluable. The author also thanks Professor Bruce Ryder for his encouragement and very useful comments on an earlier draft.

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I. INTRODUCTION

In an effort to make the clinic accessible to people who have not traditionally had meaningful access to legal services, Parkdale Community Legal Services (PCLS) has adopted two policies: not representing landlords in landlord-tenant disputes; not representing men in cases where spousal assault is an issue.¹ Chronologically, PCLS's policy of not representing landlords, adopted in 1982, predates the policy on spousal assault. In 1994, PCLS began to reconsider its spousal assault policy, with the hope of adapting it to incorporate changes in the law and developments in the understanding of spousal assault, expanding it to include the clinic's work on behalf of victims of police violence.

These and similar policies adopted by other legal clinics have certainly not been without controversy.² The issues are even more complicated and the implications more far-reaching than anticipated when the policies were first adopted. Certainly the two policies conflict in a way that does not appear to have been considered. Given this, and the context of recent cuts to the Ontario Legal Aid Plan, it may well be time for PCLS to reconsider its case criteria. Changing these criteria could provide more meaningful access to PCLS's services for women whose tenancies are threatened because of violence against them.

The original policy and the memo on the 1994 discussions focus on family law and criminal law remedies for spousal assault.³ However, these documents are silent on the legal services an abused woman may

¹ Both policies have been reproduced in this issue of the Journal: "PCLS Clinic Manual 6.17—Policy on Spousal Assault" (1997) 35 Osgoode Hall L.J. 777 [hereinafter "Spousal Assault"]; and "PCLS Clinic Manual 6.18—Policy on Landlords" (1997) 35 Osgoode Hall L.J. 681 [hereinafter "Landlord"].

² See letter from then directors S.R. Ellis defending the tenant policy: "Landlord," *supra* note 1 at 681; and J. Abell, "Women, Violence, and the Criminal Law: It's the Fundamentals of Being a Lawyer that are at Stake Here" (1992) 17 Queen's L.J. 147; and R. Carey "'Useless' (UOSLAS) v The Bar: The Struggle of the Ottawa Student Clinic to Represent Battered Women" (1992) 8 J.L. & Soc. Pol'y 54.

³ See "Spousal Assault," *supra* note 1.

need with regard to her housing situation. The spousal assault policy assumes that a woman will leave her home.⁴ This assumption is one of the reasons given for adopting the policy, but then a woman is in greater need of PCLS's services if leaving the residence is not possible. The policy does not consider whether her departure will lead to her being held responsible for unpaid rent (perhaps through a default judgment she will not know about for months or years) or her potential liability for damage to the apartment caused by her abuser. Neither does the policy consider that a woman may want to remain in her home and have her abuser evicted.⁵

For many years, PCLS and other legal clinics have been involved in advocacy around issues of violence against women in different areas of law, in particular criminal law and immigration law.⁶ This advocacy has included community work, law reform, and casework. Currently many community groups and some legal clinics are fighting changes at the Criminal Injuries Compensation Board which limit women's access to compensation and do, in some cases, put their lives in danger. As noted above, violence against women can lead to legal problems with regard to a woman's tenancy, but clinics have not done as much work on this issue. This may be because clinics have tended not to want to create an imbalance of power by representing one tenant against another in an attempt to have the other person evicted. The fact is that all tenants do not have equal power and sometimes the threat to a woman's quiet enjoyment of her premises is from someone other than the landlord.

Female tenants face violence, including threats, harassment, assault, sexual assault, and attempted murder, in their homes. These forms of violence can arise in any of the following situations:⁷

⁴ *Ibid.* at 780.

⁵ See A. Orlando, "Exclusive Possession of the Family Home: The Plight of Battered Cohabitees" (1987), 6 R.F.L. (3d) 82. This article, by a former Parkdale student, discusses possible legal remedies for abused common law wives to use to remain in their homes. PCLS did recognize the link between violence against women and homelessness in its paper "Homelessness and the Right to Shelter: A View from Parkdale" (1988) 4 J.L. & Soc. Pol'y 33.

⁶ For example, in 1991 and 1992, PCLS acted for the Canadian Council for Refugees in its intervention in *Canada (A.G.) v. Ward*, [1993] 2 S.C.R. 689. Part of the argument advanced by PCLS centred on the need to interpret the refugee definition in a way that did not have an adverse impact on women seeking international protection. See R. Shacter, "The Cases of *Ward* and *Chan*" (1997) 35 Osgoode Hall L.J. 723.

⁷ The following examples are from the files of the University of Ottawa Community Legal Clinic (UOCLC). UOCLC started its women's division in 1990 to provide services to women who were or who had been the target of violence. At that time there were relatively few caseworkers in the division and they were cross-appointed to other divisions in the clinic. Since then, the work of the division has expanded tremendously and it now has the most cases of any division in the clinic. A

1) tenant versus landlord or agent: as in the case of *Q. v. Minto*,⁸ the woman is at risk from the superintendent, the landlord, or another agent of the landlord; 2) tenant versus outsider: the woman is at risk from a non-tenant, for example a current or former boyfriend. This person may have access to the common areas of the building because of poor security; 3) tenant versus tenant: the woman is at risk from a tenant in another unit of the same building; and 4) co-tenant versus co-tenant: the woman is at risk from a tenant who lives in the same unit as she does.

II. CURRENT LEGAL FRAMEWORKS

Part IV of the *Landlord and Tenant Act*⁹ regulates the relationship between landlords and tenants. It does not provide any means for tenants to take action for the eviction of other tenants who may be a threat to their safety.¹⁰ As a result, women who face violence from other tenants may have to choose between moving out to preserve their own safety and remaining in their home, risking their safety because they cannot afford the costs of leaving the rental premises.

Tenants whose safety is threatened by the landlord or the landlord's agent have some recourse under the current law, but this recourse is neither fast nor certain enough to provide effective protection. For example, they may make an application to the Ontario Court (General Division) under section 113 of the *LTA* for termination of the tenancy. They can request retroactive termination under this section if they have already vacated, however, this is not easily obtained.

substantial proportion of the files of the Aboriginal Legal Services, which works out of the Aboriginal Women's Support Centre in Toronto, are also related to violence against women. In addition to being a "case magnet," the existence of the women's division has had another important effect. It has raised awareness generally, both through formal training and informal interaction between caseworkers, of the prevalence of violence against women. This has enabled caseworkers in other divisions to recognize the possibility of abuse being an issue in their cases. The relevance of violence against women to the legal issues in criminal, civil, and tenant cases is now recognized much more readily by caseworkers in these divisions.

⁸ (1985), 49 O.R. (2d) 531 (H.C.J.).

⁹R.S.O. 1990, c. L.7 [hereinafter *LTA*].

¹⁰ Despite submissions calling for the government to include such a remedy in the new (and most inappropriately named) *Tenant Protection Act*, S.O. 1997, c. 24 [hereinafter *TPA*], the government did not do so. See Ontario, Legislative Assembly, Standing Committee on General Government, *Hansard*, 1st Sess., 36th Parl., 1996 (Chair: D. Tilson) (28 August 1996): submissions by the Ottawa-Hawkesbury Legal Clinics over changes to rent control legislation. See also, Ontario, Legislative Assembly, Standing Committee on General Government, *Hansard*, 1st Sess., 36th Parl., 1997 (Chair: D. Tilson) at G4101-31 (8 August 1997): submissions by several Ottawa area clinics to the same committee on 8 August 1997 over the *TPA*. The *TPA* received Royal Assent on 28 November 1997 but had not been proclaimed in force as of the end of the year.

Depending on the nature of the threat, they may also have the landlord charged under section 122 of the *LTA* for violating their privacy. This is a provincial offence and is enforced through the provincial criminal courts.

Tenants at risk from outsiders because of poor security in the building may be able to obtain a court order requiring the landlord to improve security in the building by bringing an application under section 94 of the *LTA*. This section sets out the landlord's responsibility to keep the premises fit for habitation which, arguably, includes an adequate security system. Alternatively, such tenants may be able to rely on section 23(1) of the *Conveyancing and Law of Property Act*,¹¹ which sets out the tenant's right to quiet enjoyment of the premises.

Tenants who are stalked by outsiders may need more than the usual security measures to protect them, but tenants stalked by other tenants in the same building are even more vulnerable, since these tenants have a key to the building. Tenants at risk from other tenants in the building, either those living in another unit or co-tenants, have no right to any remedy directly from their assailants under the *LTA*. All they can do is to ask the landlord to evict their assailant for either disturbing their reasonable enjoyment of the premises (section 107(c)) or committing an illegal act (section 107(b)). Where landlords are unwilling or unable to provide this remedy or level of security, such tenants often must choose between their safety and a financial penalty for moving. A landlord-tenant law that recognized the reality of women's lives would allow them to leave their apartments without penalty in such situations. If the only protection available to them is to hide from their stalker, the law should not prevent them from doing so.

As detailed above, there is nothing in the *LTA* that requires the landlord to proceed against the assailant. The time required to convince the landlord to act, when added to the time needed to bring the application, keeps the woman in a dangerous situation for several weeks. In my experience, landlords have not been particularly helpful in dealing with these situations. Again, where landlords are unwilling or unable to provide the necessary level of security, the law should allow such tenants to leave their apartments without penalty.

In Ottawa, the Social Housing for Abused Women Network (SHAWN) has been negotiating with private and public landlords to develop protocols for the safety of female tenants. SHAWN found the social housing groups much more open to the idea and together they have negotiated a protocol. Interestingly, SHAWN has also found that since the protocol was negotiated and regular meetings have ceased, it

¹¹ R.S.O. 1990, c. C.34 [hereinafter *CLPA*].

has been more difficult to work out problems. The regular meetings seem to be more important than the protocol itself. Private landlords were basically not interested in such an initiative. One of the biggest Ottawa landlords simply said that, even with regard to their subsidized units, they are in business and are not responsible for providing a safety net. Another large landlord did not even want abused women on welfare as tenants unless they were on "rent direct" payments from social assistance. Small landlords were also generally reluctant to become involved in this project because they saw themselves as being in such a risky financial situation. Without government money, most landlords were not willing to break a lease to allow a woman to leave a dangerous living situation. One landlord's agent, who was interested in assisting women in violent situations, said she would have no problem renting to women who are leaving an abusive relationship because she found them to be very reliable tenants. Her concern was that when she had become involved in a violent incident and called the police, the police did not help.

Arguably, because so much of the threat is hidden from the public, the situation of greatest danger is when a woman is sharing an apartment with her abuser. If the abuser meets the definition of "tenant" under the *LTA* (*i.e.*, is not a guest), the landlord will not change the locks on the apartment to ensure her safety, for fear of a civil proceeding or charge under section 122 of the *LTA* by the abuser. She therefore must live in danger unless and until the landlord takes the necessary steps to evict the abuser. Frequently the abuser threatens that he or she will "trash" the place if she leaves, then disappear, leaving her with the bill if her name is on the lease.

Additionally, women who do not meet the definition of "spouse" under the *Family Law Act*¹² (*i.e.*, married, living together for three years, or in relationship of some permanence with a child in common) are not eligible for a restraining order, and those who are not legally married cannot obtain an order for exclusive possession of the family home (which can include rented accommodation). A peace bond under section 810 of the *Criminal Code*¹³ is not a very effective form of protection. It is not always easy to obtain, particularly when the applicant must act for herself. In addition, police response varies

¹² R.S.O. 1990, c. F.3 [hereinafter *FLA*].

¹³ R.S.C. 1985, c. C-46.

considerably, and there is no requirement that the abuser surrender his keys or that the landlord take steps to end his tenancy.¹⁴

The province of Saskatchewan has passed legislation that provides protection to all victims of domestic violence, regardless of whether they are covered by family law legislation (the *Victims of Domestic Violence Act*).¹⁵ One possible strategy would be to lobby for a variation of this *Act* to be added as Part V of Ontario's *Landlord and Tenant Act* (or as Part XII of its successor, the *Tenant Protection Act*).¹⁶

Saskatchewan's *VDVA* allows women who have experienced violence (including threats) from co-tenants to apply immediately to a justice of the peace for an emergency intervention order for the following: exclusive possession of the home; provisions directing a police officer to remove the abuser and to supervise the removal of belongings from the home; a restraining order; any other provision the justice of the peace considers necessary for the immediate protection of the victim (for example this could include a surrender of keys). The emergency intervention order can be requested very quickly, including by facsimile (section 8(2)). The respondent need not be present, although the order is not effective until he or she is served with it.

A victim's assistance order is also available under the Saskatchewan legislation (section 7). This law provides the same protection as the emergency intervention order as well as additional remedies, such as an order for the return of belongings and identification and for compensation. The hearings for these orders do not appear to take place on the same urgent basis as do those for emergency intervention orders. The burden of proof in both hearings is the usual civil standard—on a balance of probabilities.

The *VDVA* also provides that a landlord may not evict a victim who gains possession of the unit through such an order merely because her name is not on the lease. The legislation also allows her to remain in the unit if she assumes the responsibilities of the respondent (*i.e.*, the abuser—section 10.3).

Because it is unreasonable to expose the victim of abuse to the risk of further violence by requiring her to pursue her abuser in the courts, the responsibilities she assumes should only be prospective. In

¹⁴ The *TPA*, *supra* note 10, does not give women any new remedies to pursue dangerous tenants or to require landlords to act in such cases. When facing violence in rental accommodation, their options are essentially unchanged from those under the *LTA*, although it may, if the landlord cooperates, be possible for an abuser to be evicted more quickly under the *TPA*.

¹⁵ S.S. 1994, c.V-6.02 [hereinafter *VDVA*].

¹⁶ *Supra* note 10.

other words, to remain in the unit, she will have to enter into a new lease with the landlord to, for example, pay an amount of rent no higher than the respondent had agreed to pay.

If the *LTA* or its successor is amended to provide certain protections to the tenant, the amendment should state clearly that the woman is not responsible for rent owing by the abuser. What we know about abusers' financial status means that it is not realistic (even if it were fair, which it is not) to expect the woman to be able to pay the respondent's back rent. If the respondent owes the landlord money for lost rent or damage, the landlord, who does not face the same threat of retaliation as the victim, should be able to pursue him or her, without recourse upon the abused, in the same way that landlords now pursue tenants who abandon premises without notice or who may have damaged the unit. Given the social costs of violence against women, this is, overall, the most effective option.

III. IS THE SASKATCHEWAN LEGISLATION REALLY A SOLUTION?

Although Saskatchewan has pushed to achieve more protection for women, many questions arise regarding legislation of this type:

1. Will the *VDVA* leave a woman responsible for past debts of her abusive co-tenant and make it clear that it is up to the landlord to pursue these debts?
2. Will the *VDVA* require landlords to ensure that the premises are safe enough to prevent violence?
3. Will the legislation be interpreted in gender neutral form and therefore be used against women, including by their abusers?
4. Will justices of the peace be trained on issues of violence against women to avoid incorrect assessments of credibility and other problems that may arise in the applications for orders?
5. Women already have great difficulty getting assistance in prosecuting peace bonds. Will the new legislation provide access to the protections it offers, or will they have difficulty in finding representation to obtain emergency intervention orders?
6. Will this legislation "excuse" (at least in their minds) members of the government from taking other measures to assist women in abusive situations, including those who are not in a position to leave the abuser?
7. By placing the responsibility for getting these orders to individual women, does this legislation absolve society of the responsibility to respond to the violence? Or is it helpful to provide women with at least

some recourse in situations of violence in rental accommodation, given that they currently must depend on others to enforce their right to quiet enjoyment?

IV. THE ROLE FOR CLINICS

Although flawed, the Saskatchewan statute recognizes the particular needs of women who face violence in rental accommodation. It attempts to provide them with legal remedies not available to them under landlord-tenant or family law legislation. In contrast, the traditional view of landlord-tenant law has not focused significantly on the needs of female tenants as they are different from or in opposition to those of male tenants.

The tendency of tenant advocates not to consider issues of violence against women in housing is demonstrated in a recent "News Flash" from the Coalition to Save Tenants' Rights.¹⁷ Under the heading "Province doesn't listen to tenants—again!!" the newsletter cites an amendment to the proposed *TPA* which provides a "fast track eviction process" for a landlord to evict a tenant who threatens other tenants' security (section 61.1). While the *TPA* will work to the detriment of many tenants, a fast-track eviction process may help those tenants who are not safe from violence in their homes. Such tenants, in fact, may benefit from even more power to have their abusers evicted, including a provision which would give them the power to evict the abuser themselves or to force their landlords to complete the eviction. Interestingly, the purpose of this newsletter was to criticize the power to evict tenants sooner, not the insufficiency of protection of abused tenants in the proposed legislation.

Few of Ontario's community legal clinics practice a significant amount of criminal law or family law. Most do a great deal of work on behalf of tenants, including outreach and organizing, casework, law reform, and public legal education. It will therefore be even more contentious to adopt a "no abusers" policy with regard to tenant representation than it was for criminal or family law cases, although the reasons for doing so are the same. As *PCLS* stated in its 1982 policy on spousal assault, "there is the basic problem of encouraging assaulted

¹⁷ Coalition to Save Tenants' Rights, "Newsletter" Issue No. 24 (26 August 1997). As noted on the newsletter, the coalition "is a province-wide coalition of tenants, tenant groups, community legal clinics, and others committed to tenants' rights" who are fighting the proposed changes to the *LTA*.

spouses to take legal action.”¹⁸ Women need to know that the clinic is a safe place where they will not be confronted by their abuser. They also need to know that there is a legal remedy for them. If clinics act for abusers and therefore set precedents that will make it harder for the abusers to be evicted, the legal remedies for women’s safety in their home will be harder to obtain. As noted in the PCLS policy, clinics may find themselves perpetuating myths around wife assault in their casework on behalf of abusers (for example, the abused lied, exaggerated or the abuser was defending himself) even though they are working against these stereotypes in other ways.

A significant difference between 1982 and today is that cutbacks to the Ontario Legal Aid Plan may make it difficult, if not impossible, to find representation for those refused as clients because of a policy of not representing clients against whom there is an allegation of abuse. For a “no abusers” policy to be meaningful today, the policy could not contain a provision such as that stated in the PCLS policies, which provide for representation by PCLS if alternative representation cannot be found.

What is the role for clinics in these cases? Should we be representing tenants against tenants? As mentioned earlier, many clinics do not act for tenants against tenants because of an assumption that the imbalance of power in such cases is not as significant as that between tenant and landlord. Thus a tenant who is being abused by a co-tenant would have to face her abuser directly, while the abuser would be represented by a legal clinic if the victim could convince the landlord to take action against him. It is questionable whether this policy uses the clinics’ resources best or helps the most disadvantaged party.

Is representing an abused tenant against her assailant enough? Ought we to give advice to landlords on how to evict tenants who are threats to our clients? Because the law does not require landlords to act in such cases, and because unrepresented landlords can delay the process if they are unfamiliar with landlord-tenant procedures, should clinics encourage landlords to evict abusers of their tenants by providing the landlords with free legal advice in such cases?

These are difficult questions. They are important, however, because they ask us to look at access to justice for disadvantaged people in a context many clinics have not considered before. The questions point out the tensions and contradictions between PCLS’s two policies and in a period of ever more limited resources, they ask who among the disadvantaged will have access to legal services. If Parkdale is considering expanding clinic policy so as not to represent people who are

¹⁸ *Supra* note 1 at 780.

alleged to be the abusers and attackers, it is halfway to helping women whose abusers are co-tenants. Will the policy go the rest of the way by providing these women and, where necessary, their landlords with the legal services they need to have the abusers evicted? Other improvements for women in these types of situations need to be achieved, including: forcing landlords to provide proper security; protecting tenants at risk from landlords, their agents, or outsiders; preventing landlords from recovering unpaid rent when tenants vacate without proper notice because of a violent relationship or due to the cost of damage repairs of the apartment by the abuse. Clinics cannot ignore, however, that this list will fulfil only some of the needs of tenants in abusive situations. The hard questions remain.

V. CONCLUSION

Parkdale Community Legal Services has been a leader in the community legal clinic system for many years. It has played an important role in advancing the interests of poor people and disadvantaged groups through its community work, casework, test cases, and law reform. It has trained generations of clinic lawyers¹⁹ and its policies and practices have influenced other clinics' work. Over the years, a particular focus of PCLS's work has been advocacy on behalf of abused women. Its work has ranged from fighting the deportation of immigrant women whose sponsorships have been withdrawn by their abusers to challenging decisionmakers in the criminal courts and at the Criminal Injuries Compensation Board who blame women for the violence they experience.²⁰ Surely it would be appropriate for Parkdale, as it enters its second quarter century, to reconsider its policies on spousal assault and the representation of landlords, and to reformulate both in a way that will ensure meaningful access to all of the legal services female tenants need to be safe in their homes.

¹⁹ In Ottawa for example, half of the clinic lawyers are former Parkdale students.

²⁰ See, for example, *Ontario (A.G.) v. CICB* (1995), 22 O.R. (3d) 129 (Div. Ct.).



Parkdale Neighbourhood Fair, 1976



Parkdale Fair in its Fairy Clothes

THE PARKDALE NEIGHBOURHOOD

(The name of "Keweenaw")

If you are lonely and have a long way, just come in or call -
PARKDALE!

If we need something, we will always befriend you, just come in
or call - **PARKDALE!**

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Watch people grow.

See how we and our staff work together on all your troubles.

Come on your terms, just call.

PARKDALE! - The name of justice for you!

PARKDALE! - Lawyers here waiting for you!

PARKDALE! - Working on Green Street for - 1967

1976

Exposed James Lumb
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