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Article 28

PCLS Clinic Manual 6.17 - Policy on Spousal Assault

PCLS CLINIC MANUAL 6.17—POLICY ON SPOUSAL ASSAULT©

At the December 1982 meeting of the Parkdale Community Legal Services (PCLS) board of directors, the following policy was approved:

> THAT this Clinic recognizes wife assault as a serious issue and wishes to pursue a program of community education and law reform on this matter and that to facilitate this program the Clinic will not represent male clients in cases where spousal assault (spouse to be widely defined) is an issue, unless we are unable to find other representation for the client.

This policy applies to all support, custody, access, restraining order, child welfare, assault, harassment, and threatening cases.

Please note that it is not necessary that spousal assault be admitted. There need merely be an allegation. Also, note the duty to find alternate representation for a male in a spousal assault case when he is the first to apply to our clinic for help.

Some people have suggested that such a policy encourages clients to lie in order to get representation. Such is not the case with the PCLS policy. It does a client no good to lie and claim that he never beat his wife; we are not interested in whether or not he actually did, we will not represent him if there is an allegation of abuse. We will inevitably hear of such allegations before any court date, so again there is no incentive to hide the truth.

What follows is the text of a position paper sent to the board by members of the clinic staff prior to its consideration of this issue at the meeting, where this policy was adopted. This paper gives background to the policy, which at that point had been approved by the office committee after having been proposed by the family and welfare group.

THE PROBLEM

According to "the best estimates available," the Canadian Advisory Council on the Status of Women states that one in ten Canadian women who are married or in a relationship of some

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 This is an edited version of a position paper in support of the policy, which first appeared in the PCLS *Clinic Manual* as Policy 5.5 in June 1983. This document also contains a review of the policy that was conducted in May 1994.

permanence are beaten by their spouses.[1] This is evidenced by the fact that women's shelters are always rapidly filled upon opening. Eight out of ten of the women who go to such shelters have been beaten while pregnant, and one-third of them are beaten weekly. One-quarter of Canadian divorces cite physical cruelty as a ground.

Women in this situation tend to think that their spouse is ill and will get better, or that they have somehow provoked the beatings and if they could be "better" wives, the beatings would stop. In fact, the beatings generally get worse, especially during pregnancy. As well, they are often ashamed of the fact that their spouse beats them, and also ashamed to leave him. Further, these women often are afraid to leave him and to take legal action. This has been the experience of PCLS students in dealing with such cases. The shame that a woman may feel, for something which is not her fault, is often reflected in society's attitude toward her. The roots of spousal assault can be found in the deep seated notion that it is all right for a man to physically dominate a woman.

There are more problems once an assaulted woman overcomes the personal and societal pressures against taking action. If she calls the police she will not get the same response as she would get to an ordinary assault (in fact, most lawyers advise such clients not to mention that it is their husband who is assaulting them when they call the police). In spite of some changes, police are still reluctant to respond to "domestic" calls, and when they do arrive they try to mediate rather than arrest the offender and lay charges. And if a woman does insist that charges be laid, even Attorney General Roy McMurtry has recently admitted that some officers wrongly believe that they must personally witness a wife-beating before they can lay a charge.

An assaulted woman then has the option of personally laying charges. (If she is aware of this option.) She is meanwhile faced with problems of shelter, food, and perhaps medical attention for herself and possibly her children as well. She will quite likely encounter an unsympathetic justice of the peace, who will discourage the laying of charges and try to divert the woman to Family Court for family counselling. As a practical matter, if a woman falls within the definition of a spouse under The *Family Law Reform Act, 1978*,[2] she can lay a

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[1] See D.J. Lewis, *A Brief on Wife Battering With Proposals for Federal Action* (Ottawa: Canadian Advisory Council on the Status of Women, 1982) at 1.

[2] S.O. 1978, c. 2, s. 1(f):

"spouse" means either of a man and woman who,

(i) are married to each other,

charge at Family Court. However, if she has gone to criminal court and the justice of the peace tries to divert her, she may well be discouraged from going, assuming that she will be redirected once again.

Once past this hurdle, the Crown is unlikely to pick up the case, and the woman will go to court unrepresented, without the aid of the Crown or the police in preparing her case. She will also probably be threatened by her husband to drop the charges. There are many difficulties in gathering evidence in such a case, problems of which she is unlikely to be aware.

At trial, standard defences open to the accused are that this is a matter which belongs in Family Court, that 'family quarrels' are not serious enough to merit consideration by the criminal courts, and that there was provocation, *i.e.*, "she made me do it because she made me angry"—defences which implicitly support the already prevalent notion that such violence is different from ordinary violence and should be condoned. Such defences usually result in the dismissal of a case, or in lenient sentencing. Counsel for an accused has a duty to employ such defences.

An application in Family Court has other problems. Exclusive possession orders cannot be obtained in Provincial Court (Family Division) and in a custody dispute a woman forced to leave her home due to physical violence finds herself at a disadvantage because her husband has had de facto custody of the children in the interim. This can occur because she is unaware that she can apply for interim custody, because of the time lag in getting an interim custody motion before the court, or because she loses the motion because she has no place to keep the children since she has been kicked out of the home.

In Family Court, the husband will again argue provocation. And if there is an order against him, restraining him or ordering custody to the wife, the police are often reluctant to enforce such orders, even when they are specifically directed to the police.

The legal minefield which an already injured and distraught woman must face usually leads to charges not being laid, or being dropped, or failing in court. The assaulted woman then becomes discouraged and disillusioned and gives up on the legal system.

(ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity, or

(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year.

OUR RESPONSE

Parkdale Community Legal Services would like to organize a concerted effort of education and action regarding this problem. A problem of legal education and reform could be seriously undermined if the resolution of the office committee is not accepted by the Board.

First of all, there is the basic problem of encouraging assaulted spouses to take legal action. Our experience is that this can be very difficult. It is also our experience that women who do come here want to know if we represent wife assaulters. This concern was repeatedly expressed when there was a special clinic for assaulted wives at Parkdale Community Legal Services. It is difficult for members of the public to appreciate the mental gymnastics which allow a lawyer to represent both wives who are assaulted and husbands who assault. We would be helping to encourage such women to come forward if we had a clearcut policy on this issue.

Another aspect of this issue is the defences which we have a duty to employ on behalf of wife-beaters, as noted above. To employ such defences supports false premises present in our society—premises which we are working to change on the the level of community legal educational and law reform. Again, it would be better to have a consistent policy.

It is important to realize that we are not saying that we do not wish to represent wife-beaters because we "don't like them." The issue is not one of personal preferences. We are not denying representation to these men to punish them; we are doing it on sound policy grounds as part of a program to combat a problem which is tied to deeply rooted attitudes in our society. We are also not pre-judging the client's guilt. It is irrelevant how guilty a man is in this situation: we are not saying, "You're guilty, you're a bad man, and we will not help you." We are saying that if there are allegations of spousal assault then our clinic does not wish to represent a male client as part of our policy of encouraging assaulted wives to take legal action and our policy of attempting to reform the legal system and to get it to work for assaulted wives.

As well as the legal system being slanted in favour of the husband, the wife who leaves home due to to physical abuse is in greater need of our services because of all the other problems she is facing at the same time, that with the severe blow to her self esteem (because of society's attitude to mothers who "abandon" their children) and the problems of finding food, shelter, and medical attention. We are, in fact,

agreed that we should not turn away clients simply because we do not like them.

It should also be noted that we do intend to find representation for persons whom we cannot accept as clients due to this policy—through another clinic or Legal Aid. We anticipate no problems with this, and we feel that a husband in such a case is more likely to receive competent representation than a wife is likely to find a lawyer sympathetic to the myriad problems facing her. If we are unable to find representation for an assaulting husband, we will represent him.

It is often said that the traditional ethics of practice involve accepting all clients. In fact, all law offices have case criteria. Most will only take a client on if the client has enough money. We only take on clients who have a low income and who live in a certain geographic area. Many law firms specialize in a certain area of the law, and at PCLS we do not handle certain kinds of cases. As regards choosing sides within a particular area of law, labour law firms are on either the management or labour side; the Canadian Environmental Law Association (another legal clinic) will not represent polluters; personal defence lawyers who are regularly retained by insurance companies generally do not act for plaintiffs in personal injuries cases; law firms who represent major land developers are not often found acting for ratepayers' associations; and at PCLS we do not represent landlords. One of the stated reasons for our policy on landlords is that the general public would have difficulty appreciating an ethical stance which allowed us to represent both landlords and tenants, and they would feel that we had "sold out." It may be useful at this point to consider the following paragraph from the letter of Ron Ellis (then director of PCLS) to the city executive committee (11 August 1975) on this policy:

> *We are trying to make this office accessible to a part of the community who traditionally have never turned to lawyers for assistance* and who traditionally have been the targets of legal process and of lawyers, and rarely beneficiaries or clients. To have any hope of accomplishing that objective, the office believes that it must work at establishing and maintaining an image of a place that represents the interests of low-income people. Acting for landlords is destructive of that effort.[3]

Mr. Ellis went on in that letter to consider the anomalous position which the clinic would be put in if it tried to establish leading cases in an area of the law while at the same time arguing the opposite in cases for the other side.

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[3] See "PCLS Clinic Manual 6.18—Policy On Landlords" (1997) 35 Osgoode Hall L.J. 681 at 682 [emphasis added].

We would ask you to consider both of these points in the light of the policy grounds laid out in this paper. And we would refer you to one further paragraph from Mr. Ellis' letter explaining board policy:

> The law profession's tradition of being willing to act on either side of any issue is a tradition much-mentioned by opponents of this policy to which some reference needs to be made. That tradition has always been subject to the exception that any law office which wishes to develop or maintain a particular acceptability in the eyes of clients with special interests, is free to refuse to act for persons or organizations that are seen by those clients as antagonistic to those interests.[4]

Finally, the cases to which this policy would apply are family law cases, child welfare cases, and criminal cases, where there are allegations of wife assault. This policy would not apply to such men coming in for help with consumer, welfare, immigration problems, etc.

We expect the resolution of the office committee to be raised for discussion by the board at your meeting of 15 December 1982. We hope that this paper and the attached materials will enable you to make an informed vote.

REVIEW OF SPOUSAL ASSAULT POLICY, MAY 1994[5]

Background

[Three staff members] have met to consider the current written formulation of our policy, and what we actually do. This memo is drafted only by Phyllis [Gordon—then clinic co-director], because of time constraints, and is a discussion paper, hopefully to assist us in reformulating our policy. It is also broader than the discussion with [the staff].

The policy adopted by the board of PCLS in December 1982 is as too limited in its scope because:

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[4] *Ibid.* at 683.

[5] Despite this review and a flurry of correspondence within the clinic in the succeeding months, the policy remains in force, exactly as it was adopted in 1982. See the following internal clinic documents for the discussion of possible changes to the policy, all of them unpublished but on file at the clnic: Memorandum of K. Kolnhofer to all divisions (21 March 1995); Memorandum of subcommittee reviewing the Violence Against Women Policy to Management Team (19 April 1995); Memorandum of the policy committee, board of directors to clinic staff (17 May 1995); Memorandum from S. Gavigan on behalf of Management Team to Gail Cadieux, Ray Kuszelewski, and Bart Poesiat regarding changes to the policy (10 May 1995); Memorandum of subcommittee to policy committee (14 June 1995); Memorandum of K. Smith to S. Gavigan regarding subcommittee recommendations (26 June 1995); and Minutes of Board of Directors Meeting (28 June 1995) at 2.

1) We currently represent women and children who are victims of other than spousal assault, however broadly defined. For example, we represent or advise women who experience stranger violence, date rape, abuse from parents, siblings, other family members, and lesbian partners. Ex-partners are also included.
2) The old policy does not describe what spousal assault is. Several definitions can be found in the discussions of this issue. They include the following behaviors:

Conduct that harms, gains or maintains power and control over another person. These include physical, emotional, psychological and sexual abuse, sexually exploitative, and threatening behaviors that curtail an individual's personal power and/or create an atmosphere of fear and intimidation.

The following are examples of abuse: hitting, punching, interfering with sleeping or eating, restricting the mobility or access of a differently-abled partner, forced sexual acts, repetitive and excessive criticism, humiliation and degradation, restricting access to personal resources or friends, homophobic, racist, misogynist attacks, threats, or harm to pets.

3) The law is changing as well. For example, the *Family Law Act*[6] recognizes psychological violence. Some jurisdictions are recognizing violence within families that is much broader than the spousal assault focus. For example, Saskatchewan's new law will permit intervention permitting removal of the abuser from the home and keep the abuser away from the victim.[7] It is broad enough to cover all forms of domestic violence, including abuse of spouse, children, the elderly, the disabled and other vulnerable persons.

4) We also represent victims of police violence, currently. This isn't recognized in formal policy.

5) Stranger violence includes attacks on clients of the clinic, or potential clients of the clinic, which is not only of the nature of male sexual attacks on women. It clearly also includes verbal and physical homophobic and racist assaults, as well as unprovoked attacks on psychiatric survivors, people with disabilities and street people. The clinic attempts to address some of this violence in some aspect of its work.

The proposal that this discussion leads up to is the expansion of the definition of violence for the purposes of defining clinic policy. *That*

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[6] R.S.O. 1990, c. F.3, s. 24(3)(f).

[7] *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s.3.

is, that the clinic would not represent people who are the abusers or attackers. This means that we would not do criminal defence work in any capacity for violence against individuals, broadly defined. (The context of civil disobedience is quite different.)

Any such policy is difficult to clarify in all cases, and so discretion in some situations might be called for, always following the spirit of the policy. For example, there may be counter-chargers laid against the victims of racist street violence which the clinic would defend.

The policy will have some impact on clinic resources. *We currently offer women victims of violence the opportunity to meet with and be represented by a female law student, if at all possible. We have inquired and believe that it is essential to provide women interpreters wherever possible and to that end recommend that mini-clinics should have at least one woman interpreter.*

Currently, the clinic would continue to represent and give priority to those we actually represent now. However, this discussion implies that we consider violence more broadly, and continue thinking through the issues involved. In particular, it will involve an increase in staff and student training regarding the experience of violence and the best way to talk to and represent people needing assistance. It will mean learning about what the needs of people are, who are victims of violence, and seeking out specialized assistance.