Draft Version 3.0 April 25, 2017. This document is published as public domain material. It may be freely used and reprinted with complete citation of the original source. For additional information about the National Action Program Against Sexual Assault project go to: http://www.napasa.info

Logic Rubric
Manual for Coding Sexual Assault Trials for Illogical Arguments

Edward Renner
Wendy Hovdestad
Amanda Parriag

> "A victimization survey conducted by Statistics Canada (1993) found that approximately 94% of women who are sexually assaulted do not report the incident to the authorities. Of the 6% that are reported, only 40% result in charge being laid. Of those cases where charges are laid, two-thirds result in convictions, but only one-half of those who are convicted receive a jail term. The final 0.8% (.06 x .40 x .67 x .5 = .008) of assailants who receive a jail term represents an exceedingly small proportion of cases, given both the seriousness of the offense and the fact that in 85% of the cases the offender is known to the victim, and thus easily identifiable." (Renner)

These were the known facts when we carried out our original research more than 25 years ago. At that time, we asked what happens along the way to cause this highly selective set of outcomes.

This previous work showed that it was the same thing, case after case. Few categories were needed to summarize all the content of the many complex trials we examined. The defining characteristics of sexual assault were conflated with the conditions for disbelief that sexual assault had happened. Most sexual assaults are committed by someone who is known to and trusted by the woman; most women who are being attacked do what they can to negotiate safety, and are not both physically harmed and sexual assaulted. But these features of typical sexual assaults were interpreted as reasons to believe that what had happened was consensual sex, not sexual assault. *Relationship*, *harm*, and *dangerousness* are terms we used then to describe the "logic" of why and how most complaints of sexual assault were "discounted" in the courts.

As it has turned out, 1993 was about as good as it has ever been. Holly Johnson (Ch. 24) has pulled together estimates of actual numbers of incidents of sexual violence, based on Statistics Canada's General Social Survey on Victimization, and has merged this with data from other sources to estimate that .003 sexual assaults results in a conviction. More recently, official Government of Canada statistics based on 2014 data confirm that 3/1000 is still the best current estimate. Rebecca Campbell in the American Psychologist (2008, 63, 702) cites similar data from American sources, and estimated that for every 100 rape cases reported to law enforcement, 7 lead to a prison sentence. She noted that prison sentences are more likely for those who have victimized women from socially privileged backgrounds "who experienced assaults that fit stereo-typical notions of what constitutes rape."

Triers of fact (judges or juries) who acquit must have been persuaded by arguments that relationship, harm, and dangerousness define situations where it cannot be determined beyond a reasonable doubt that an assault, rather than sex, took place. Our current analysis digs deeper into the structure of the arguments defence lawyers make, and that triers of fact often find convincing. We have found that several logical fallacies can be used to describe most of the defence arguments.

Why do we look at what happens in court through the lens of logic? A logic analysis is an under-utilized way to document and understand women's experience during cross-examination. Looking at Defence questioning through a lens of logic allows understanding of how it is that -- despite law reform intended to constrain the use of questions based on myths about sexual assault relating to previous sexual history, requirement for resistance, immediate reporting, and so on-- women still find the process abusive (e.g. Elaine Craig, and social science researchers (e.g. Elizabeth Sheehy) still find sexual assault myth related content in trials. Framing the problem and inquiring through the lens of logic identifies a simple, clear, additional "lever" to change the court processing of sexual assaults to require that arguments must be logical.

This logical framework is applied here to the cross-examination testimony of Mandi Gray in the trial of Mustafa Ururyar in 2016. Mandi Gray is an activist and a woman who was sexually assaulted who has waived the traditional publication ban on her identity and has spoken publicly about her assault and the court process. We have conducted this analysis with her knowledge and consent. Other analyses are planned and the collaborative participation of other victim/witnesses is encouraged. We invite feedback from women who have been sexual assaulted, both those who have and who have not gone through a court process, as well as from academics, activists, and lawyers as to its utility.

The required logical constraints (that is, what cannot be inferred about consent, if the rules of logic are honoured) are outlined in the coding manual below and then applied to the testimony of Mandi Gray in the Ururyar case. These constraints are outlined first using words, then with formal statements of logic and accompanying figures. The examples follow.

Logical Constraints

In this initial description of logic, for simplicity the term "Harmed" is used as a proxy for other types of evidence often introduced in sexual assault trials, such as:

- *resistance*
- *physically harmed*
- *statements of "I do not want to do this"*
- *emotionally distressed*
- *Immediately went to the hospital*
- *refused to remove her clothing (i.e. facilitate the assault)*

Again for simplicity: *"Not harmed" represents the absence of one or several of these items*.

There are two things which may be inferred about the relationship between consent and the list of outcomes. First, when it is known that a woman has had consensual sex, it's logical to conclude that she didn't resist the encounter, she wasn't injured, she didn't say "I don't want to"… That is, when one's friend smiles and tells one about her fantastic hot date where she made love all night, one would not

ask her if she was harmed, injured, upset, or needed help. And, second, whether in an intimate conversation with a friend or on the witness stand in a sexual assault trial, when evidence of harm is present we can infer lack of Consent. Thus, both these bullets are logical:

- *Consent allows us to infer Not Harmed*
- *Harmed allows us to infer Non-Consent*

In terms of formal logic, these two universal statements are logically equivalent. Each is the contra-positive of the other. (Contrapositive means reverse the sides and negate). As a matter of logic, when one is true so is the other. Because knowing Consent allows us to infer Not Harmed, logically we can then negate and reverse and conclude that knowing that someone was harmed allows us to infer Non-Consent.

These two statements are the sum total of what can be logically inferred. But in sexual assault trials the defence will falsely argue that the converse (reverse the sides) of both are also true.
But these two reversed statements, the logical equivalent of each other (contra-positives), are both false:

- *Not Harmed allows us to infer Consent*
- *Non-Consent allows us to infer Harmed*

However, unlike the contra-positive, the converse is NOT *equivalent to the original statement as a rule of logic*. In the case of sexual assault, the two bulleted points immediately above are actually invalid, though it may be the case that they seem similar to the earlier valid statements because they involve the same words.

Social science research has documented beyond any doubt that most sexual assaults are by a known person with whom the victim/witness has an existing relationship and that most victim/witnesses will exercise whatever limited choices they have so as to not to be physically harmed as well as sexual assaulted. Thus, the only factually true premises that may be used are:

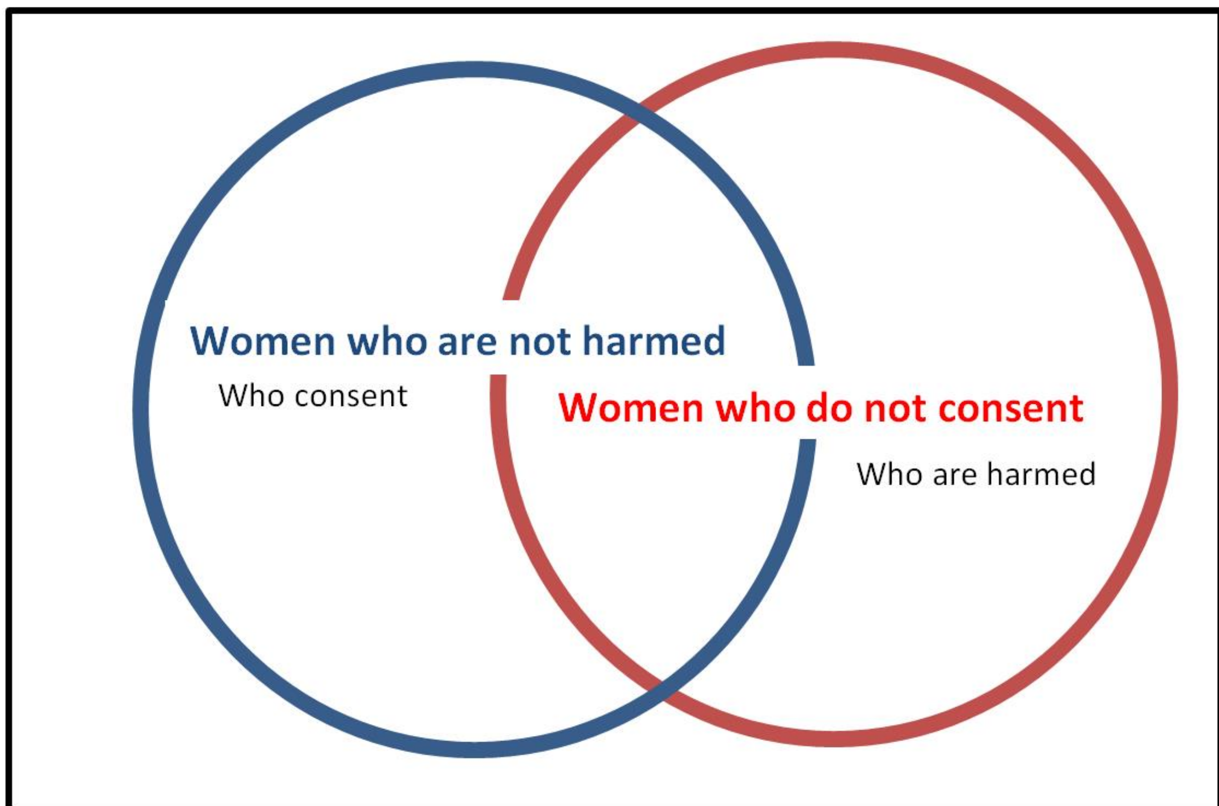
- *Consent allows us to infer Not Harmed*
- *Harmed allows us to infer Non-Consent*
- *Some Not Harmed are Consent (and therefore some Not Harmed are Non-Consent)*
- *Some Non-Consents are Harmed (and therefore some Non-Consents are Not Harmed)*

Figure 1, on the next page, present a visual representation of this in the form of two overlapping circles, and a statement using formal logic structures.

Figure 1: False Reasoning

The courts must formally recognize that Defence arguments that a woman actually consented (and is subsequently lying on the stand about having been assaulted) cannot be logical if they are based on the converse of what is factually known to be true; specifically:

All A's are not B's
Some not A's are notB's
All B's are not A's
Some not B's are not A's
Therefore:
When A is known, not B is implied
When notA is known, B/notB is undetermined
When B is known, not A is implied
When notB is known, A/notA is undetermined



Not A (Women who are not harmed)   Not B (Women who do not consent)

Translated into the words of sexual assault trials:

All women who are Harmed (A), do not Consent to sex (not B)
Some women who are Not Harmed (not A), do not Consent to sex (not B)
All women who Consent to sex (B), are Not Harmed (not A)
Some women who do Not Consent (not B), are Not Harmed (not A)

Those are the only four logical possibilities. Any argument implicit in any line of questioning must be consistent with this factual knowledge about sexual assault in order to stay within the constraint of logical thinking. To be logical and consistent with the factual nature of sexual assault, the premise must have the qualifier of "some:" *Some* women who are Not Harmed did not consent to sex.

Three Easy Pieces

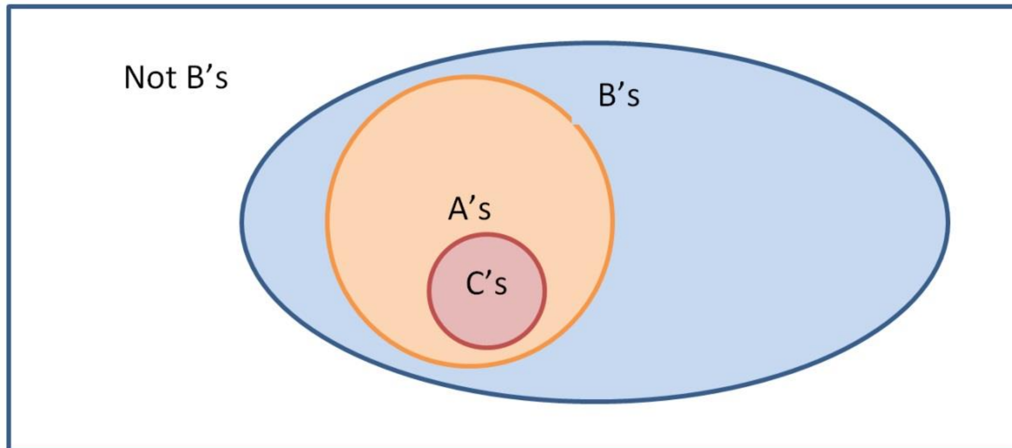
Figure 1 illustrated the formal constraints for making logical arguments in sexual assault cases. If the defence lawyer chooses to avoid these constraints of logic, there are only three alternatives; the lawyer may:

1. Use a false premise in an otherwise valid logical structure, as illustrated in Figure 2 below.
2. Use a true premise in an invalid logical structure, as illustrated in Figure 3 below.
3. Apply an argument that may be appropriate in one circumstance to a situation where it is inappropriate, as illustrated in Figure 4 below.

Figure 2: False Premise

An argument that starts with a false premise results in a false, illogical, conclusion even when presented using a valid logical structure.

All A's are B's
C is an A
Therefore C is a B



All Mammals (A's) have Two Legs (B's)
Dogs (C's) are Mammals (A's)
Therefore Dogs (C's) have Two Legs (B's)

In this example, the initial premise is false, so the conclusion has to be false even though the argument is in a valid logical format. The standard defence argument in a typical sexual assault trial uses this logically valid structure, but is arrived at through illogical reasoning based on a factually false premise; the conclusion is no more valid than dogs have two legs.

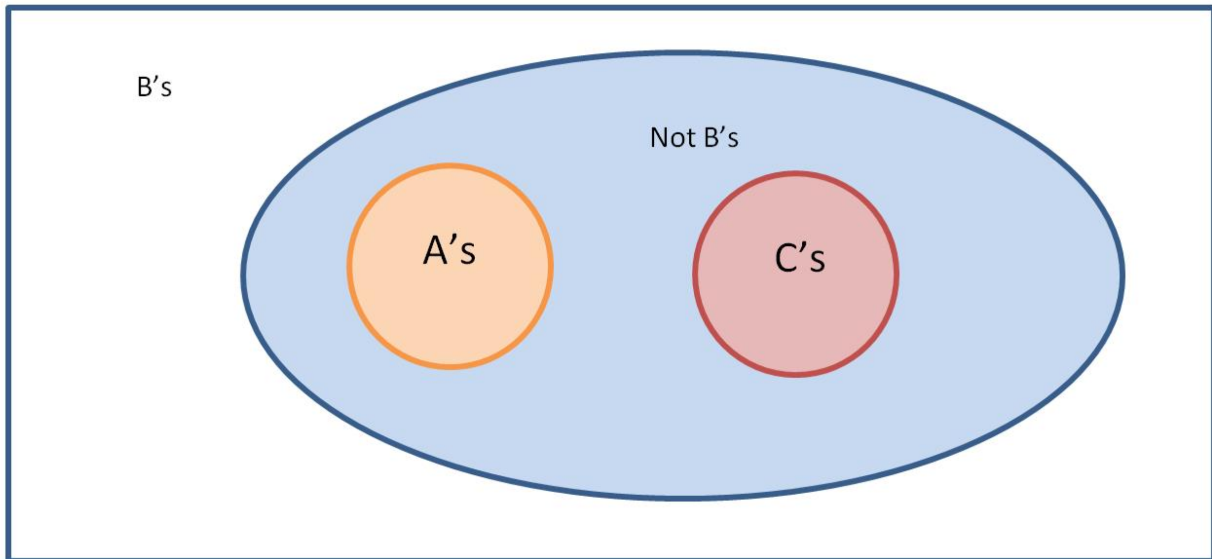
When there is no harm there is consent
This woman was not harmed
Therefore there was consent

At other times the defence will present an argument that starts with an initial premise that is factually correct in terms of the logical constraints outlined in Figure 1, but then proceed to make an argument that is structurally invalid, otherwise known as a categorical fallacy. Although obviously a form of illogical thinking it often appears reasonable in the context of common myths and stereotypes, and goes unchallenged in court.

Figure 3: An Irrational Argument

A structurally illogical (invalid) argument which results in a false conclusion, otherwise known as a categorical fallacy.

All A's are not B's
C is not a B
Therefore C is an A



All Dogs (A's) are not Cats (not B's)
You (. C) are not a Cat (not B's)
Therefore you (. C) are a Dog (A)

Translated into the words of sexual assault trials: "When a woman consents to sex (A), she is not (B) harmed. This woman (C) was not harmed (B). Therefore she consented." We see here (as before) that this form of illogical structure can be used with many Defence arguments: Women who have fabricated sexual assault claims cannot provide details. You cannot provide details. Therefore you are a woman who has fabricated a sexual assault claim.

This line of reasoning is no more accurate for confirming consent or fabrication than the conclusion you are a dog.

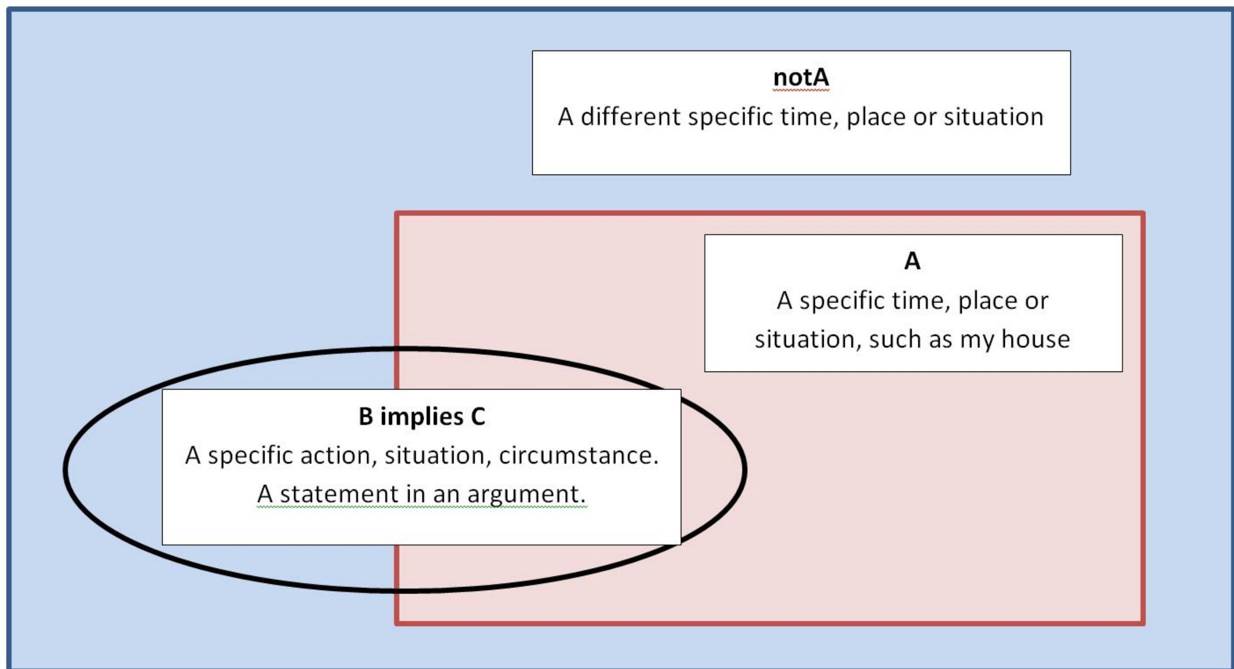
The example is particularly relevant because sexual assault trials often take place a year or more after the event. At the trial, defense lawyers often ask questions similar to those asked at the preliminary hearing or similar to statements contained in the police report. Any contradiction between insignificant

details – where was the pile of clothing on the floor – are then used to suggest the woman is fabricating the story or is an unreliable witness.

A final type of illogical argument seen in the cross-examination of sexual assault victims has to do with the wrong context.

Figure 4: Wrong Context

Something that is true in one situation may be false in another situation



In this house (A) all mammals (B) have two legs (C) may be true, but
On this planet (notA) all mammals (B) have two legs (C) is false

Translated into the words of sexual assault trials, communicating lack of consent is something a reasonable person would do in some contexts, but not in others. In the context where a woman is terrified because her attacker has made it clear that he intends to sexual assault her, she may correctly understand that communicating lack of consent will be dangerous, and that her safety from grievous physical injury is more likely if she is silent and submissive.

“A woman who does not want sex will say so” is reasonable to expect in most contexts. It may not be reasonable in the specific situation in which the witness found herself (e.g., forcibly taken to an isolated location).

Whenever the defence uses any of these three deceptive strategies, and the Crown must always object that the structure of the argument is invalid and the conclusion is false. *From the standpoint of jurisprudence this is the critical issue. Establishing this distinction will set a new legal precedent that meets the constraints of logic. Failure to establish this distinction will result in factually false beliefs (myths) continuing to be an acceptable basis for falsely inferring consent.*

To be logically and factually true, the court room testimony elicited by both the Crown and Defense has to address whether in the typical case the lack of harm (or whatever) falls into the category of consent or non-consent. *The judgement has to be based on the circumstances (time, situation and place) and credibility of the testimony, <u>not the fact that there was no harm (or whatever).</u>*

Illustrative Examples

Why do so many sexual assault cases result in an acquittal?

The current legal doctrine allows defence lawyers to routinely avoid the constraints of formal logic (Figure 1) by using factually false beliefs (common myths and stereotypes about sexual assault) in arguments that use a false premise in a valid logical structure (Figure 2), a true premise in an invalid logical structure (Figure 3), or apply an argument in a situation for which it is inappropriate (Figure 4).

The examples that follow are drawn from three separate cases to illustrate each of the three types of fallacies. We are in the process of refining the methodology by applying it to the full testimony of several current cases. When this work is completed we will add additional examples to this working manual and publish the results of the application in the context of issues of fairness and equality. We invite other scholars to use our material and participate in helping us to refine the methodology and to explore the implication of the methodology for changing the current legal doctrine that allows the practice of illogical arguments to continue.

Type	Lawyer	Category	Case ID	Reference
SA	Defense and Judge	Logic: False premise	Wagar	Transcript P 51, 58-60
Description Women who know how to take of themselves fend off unwanted sex The witness knows how to take care of herself Therefore the sex was not unwanted.				

22 Q Okay. And I'm assuming when you live on the street you have to learn to take care
23 of yourself?
24 A Definitely.
25
26 Q Definitely, because if you don't take care of yourself, you're going to be taken
27 advantage of Isn't that right?
28 A Yes.
29
30 Q And particularly given that you're a female, it's more important that you take care of
31 yourself, isn't it?
32 A Yes.
33
34 Q And -- and, ultimately, you have a lot of experience taking care of yourself, I assume?

35 A I believe so. I do.

Page 58:34……. THE COURT:…. Are your questions likely to give
36 rise to issues of whether or not the complainant was more likely to have consented to sex?
37
38 MR. FLYNN: No, Sir. The purpose of my question, Sir,
39 relates to her efforts or her ability to shrug off unwanted advances, how does a young
40 lady of her age and experience and skill -- how does she disarm an unwanted suitor. And
41 my understanding, Sir, is that she has done this in the past. And that's what I want to
60
1 just examine very quickly on that issue. It's not the issue of sex, Sir. It's the issue of
2 how does she rebuff someone's advances. And -- and I think that's --
3
4 THE COURT: So you're -- you're saying that it isn't that
5 she's more or less likely to have indulged of sex --
6
7 MR. FLYNN: No, Sir.
8
9 THE COURT: -- but she's more or less likely to have had the
10 ability to --
11
12 MR. FLYNN: To say no. To -- not -- not to say no, Sir,
13 but --
15 THE COURT: -- to -- to stop it.

…..17 MR. FLYNN: -- but to stop it. And -- and I think that that's
18 asking -- to put this, I think, bluntly, Sir, it's almost the opposite. I'm asking -- not
19 looking for information about sex. I'm looking for information of how she --
20
21 THE COURT: All right. I think I've got the argument --
22
23 MR. FLYNN: -- the negative of that.

Type	Lawyer	Category	Case ID	Reference
SA	Defence	Consent/Resistance Logic example. False Premise	Smith	napasa files
Description				
When clothing is not damaged there is consent				

D: Your bra and your panties, they weren't damaged
A: no
D: and your panty hose, you are not sure whether they were damaged or not?
A: I'm pretty sure they would have been cause they run very easily on a normal day's work.
D: but I guess you are assuming something..do you recall them being damaged or do you not recall them being damaged?
A: I know they were dirty but I really can't remember if they were ripped or not.
D: do you recall in fact washing them with your other things, the panty hose?

A: no, I think I threw them out
D: So you never even checked to see if they were ripped
A: I can't remember

Type	Lawyer	Category	Case ID	Reference
SA	Defense	False premise	Longraph	napasa files
Description				
When there is not evidence of resistance, there is consent.				

D: Why didn't you say let go.
A: He would probably not have.
D: But you didn't try.
A: No.
D: You didn't lift your seat up.
A: No.
D: You didn't try to get out of the car.
A: No.
D: The car was unlocked at that point wasn't it.
A: Yes.
D: The seatbelt was off.
A: Yes it was.
D: You didn't hit him at any time did you.
A: No.
D: You didn't scratch him.
A: No.
D: There were no marks on him.
A: No.

Type	Lawyer	Category	Case ID	Reference
SA	Court	Consent/ resistance Logic example: Irrational	Wagar	Transcript p. 119, 453
Description				
Justice Robin Camp is a Federal Court judge. In 2014, when he was a provincial court judge in Alberta, he asked a sexual assault victim, “Why couldn’t you just keep your knees together?”				

His implied reasoning was this:

When she has consensual sex (A), a woman does not keep her knees together (B).
This woman (C) did not keep her knees together (B).
Therefore she (C) consented to sex (A).

Type	Lawyer	Category	Case ID	Page #

SA	Defense	Logic: Irrational	Smith	napasa file
Description When consent (A) there is no detail, no crying and not upset(B) You (C) were not (B) Therefore consent				

D: In fact what you had told Ralph of what had happened
wasn't all this great gory detail we've heard today about
this horrible frightening experience, was the fact you
merely told him you'd been raped (tactic: rapid fire questions)
A: That's right
D: Right...You weren't crying when you talked to Mr Josie.
You weren't upset
A: No, I was still in a state of shock
D: Still in a state of shock (sarcastically)
A: That's right

Type	Lawyer	Category	Case ID	Reference
SA	Defense	Logic: Irrational	Longraph	napasa files
Description When there is consent, women do not go the hospital or call the police This woman did not go to the hospital or call the police This woman consented to sex.				

D: And you didn't go to the hospital.
A: No.
D: And you didn't call the police.
A: No.

Type	Lawyer	Category	Case ID	Reference
SA	Defense and Judge	Logic: context	Wagar	Transcript p. 4, 85-86, 87-88, 442
Description After at least a 20 minute assault including penetration with her back jammed against a faucet, the victim/witness was put into a shower and is still being questioned about whether she explicitly stated her non-consent, with the lack of an explicit statement being used to infer consent to the assault itself.				

P4:20 Dr. Hussein noted that (sic) had two bruises, one in the middle of her back
21 described as a 10 by 2 bruise, brown, tender and another bruise on her skin at the
22 tailbone, 4 by 2 centimetres, red, tender bruise in the centre.

….41 Q You agree with me though that you're sitting on a bathroom counter. It appears that
86
1 you have your tail bone right next to the sink, it looks like the faucet?

2 A M-hm.

……P87:31 Q How did he put you in the shower? Did he physically carry you into the shower?
32 A No, he led me.
33
34 Q He -- I'm sorry, you indicated --
35 A So he -- he like showed me the shower. He pointed.
36
37 Q For the record, the -- the complainant is using her two hands in a forward motion. So
38 my understanding is that, at this point, he has taken your clothes off. And my
39 understanding of your testimony is then he then starts to take the rest of his clothes
40 off. Is that also right?
41 A Yes.
88
1
2 Q And the two of you then enter the shower?
3 A Yes.
4
5 Q Or the two of you were in the shower?
6 A Yes.
7
8 Q Okay. And my understanding is that you then proceed to wash each other?
9 A Yes.
10
11 Q He soaps you up. He washes you down?
12 A Yes.
13
14 Q Is that right? Is that right?
15 A Yes, he wash --
16
17 Q And my understanding is you also soak him up and wash him down. Is that also
18 right?
19 A Yes.
20
21 Q Okay. Did you tell him that you didn't want to be in the shower?
22 A I did not.
23
24 Q Did you tell him that you did not want to wash his body?
25 A I don't recall.

…….p442:13 Q My understanding is that, while you're having this unwanted
14 sex in the shower, you tell the watcher [that's Lance] to fuck
15 off, but you don't say anything to the person committing the
16 oral sex on you.
17 A No.

Type	Lawyer	Category	Case ID	Reference

SA	Defence	Logic: Wrong Context. No longer about consent. Lack of consent already established	Smith	napasa files
Description The victim/witness had been forcibly dragged to an isolated location on the waterfront at 2 a.m. on a cold winter night and forced to disrobe and perform oral sex on her assailant while he remained fully clothed.				

Defense: And in fact when he said “I want you to go down on me,” you sat up on your knees and proceeded to perform oral sex on him, is that not correct?
Witness: Yes, yes.
Defense: Now during that time, before doing that, did you ever say to Mr. Smith, “No, I don’t want to do that.”
Witness: I... no, I was afraid. I was...
Defense: Please, [victim’s name] If you could answer the question!
Witness: I said no.

Type	Lawyer	Category	Case ID	Reference
SA	Defense	Wrong Context	Longraph	napasa files
Description The defence is trying to show that she wasn't restrained by the seatbelt and could therefore have left if she chose. What isn't said is that no one was around and she had nowhere to go. She also wasn't sure where she was because she had never been there before.				

D: Miss B just before we paused for lunch we were discussing your seatbelt and you agreed that it was a normal type seatbelt with the exception of a clasp that was broken and had to be removed with a sharp object.
A: Yes.
D: And it took 3 to 5 min. to open that and it was done by Mr. L.
A: Yes.
D: And at that time the seat was reclined back is that correct.
A: Yes it was.
D: And the seat was reclined back by him but at no time did you attempt to bring it back up to the upright position, is that correct.
A: Correct.