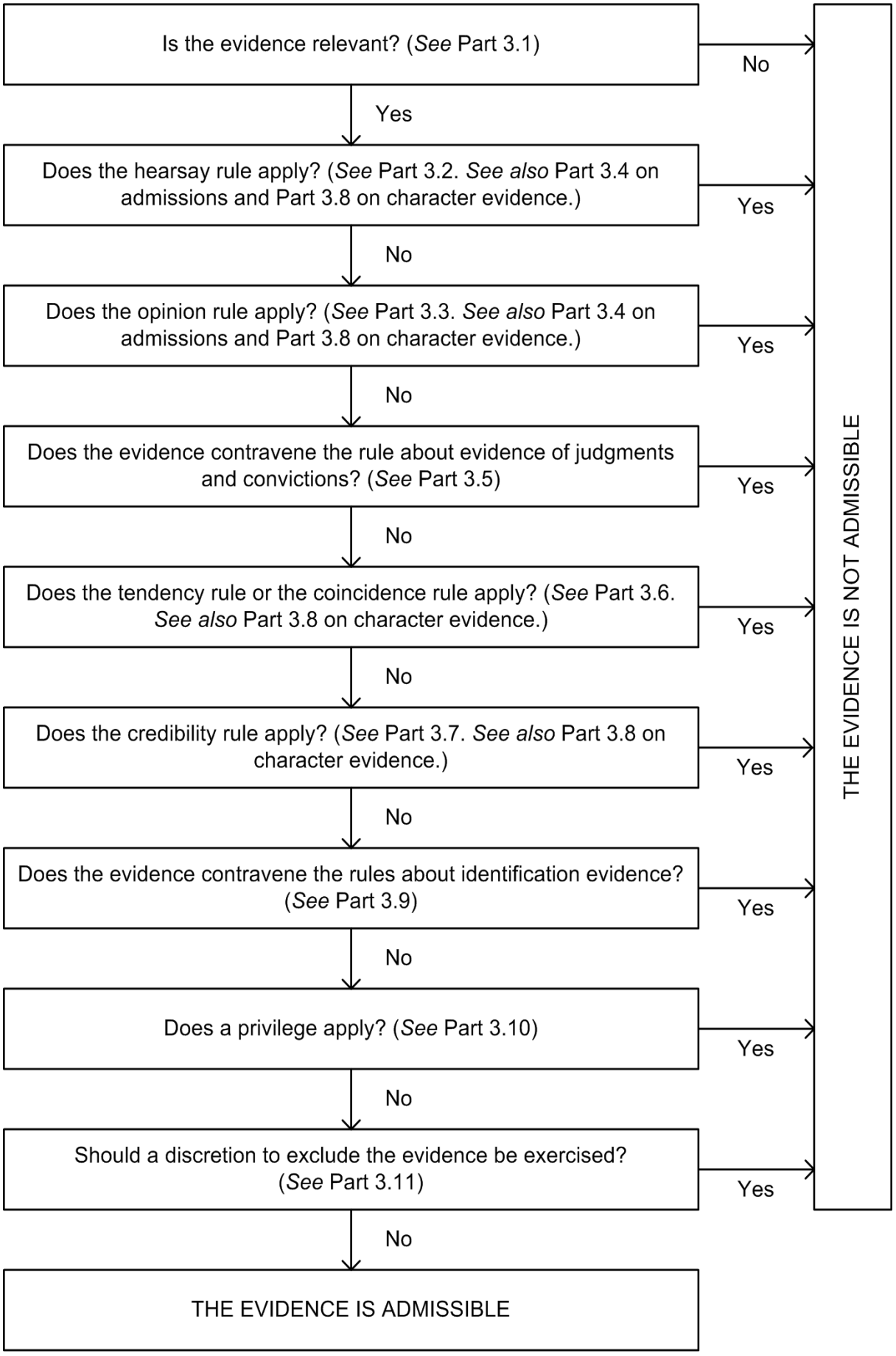
STEP 1 - RELEVANCE



PRIVILEGE – DOES IT APPLY TO THE EVIDENCE BEING ADMITTED?

1. Client Legal Privilege

1A. Dominant Purpose – What is the dominant purpose of the evidence?

<CHOOSE EITHER ADVICE OR LITIGATION>

1. Dominant Purpose = Advice

On the facts, the ruling, prevailing or most influential purpose for which the <INSERT EVIDENCE> is brought into existence, is for the lawyer, or one or more of the lawyers, to provide legal advice (*Spotless Services Ltd* 1996). The <INSERT EVIDENCE> therefore meets the CLP dominant purpose test (*Esso* 1999).

<OR>

2. Dominant Purpose = Litigation

On the facts, the ruling, prevailing or most influential purpose for which the <INSERT EVIDENCE> is brought into existence, is for the client being provided with professional legal services relating to litigation (*Spotless Services Ltd* 1996). The <INSERT EVIDENCE> therefore meets the CLP dominant purpose test (*Esso* 1999).

1B. s117 EA: Definitions – Does the scenario meet the definitions?

1. 'Client'

On the facts, the <INSERT PERSON> is clearly a 'client' for the purposes of s117 EA, as they are:

- A person or body who engages a lawyer to provide legal services or who employs a lawyers: s 117(1)(a) EA; <OR>
- An employee or agent of a client: s 117(1)(b) EA; <OR>
- An employer of a lawyer if the employer is, or is a body established under, Commonwealth, State or Territory: s 117(1)(c) EA;

2. 'Lawyer'

On the facts, the <INSERT PERSON> is clearly a 'lawyer' for the purpose of s117 EA, as they are:

- An Australian lawyer; <OR>
- An Australian registered foreign lawyer (*Kennedy* 2004); <OR>
- An over-seas registered foreign lawyer or natural person permitted to engage in legal practice in that country.

3. Case Law

R v Milat (1996) **(location visit)**

- **Facts:** The prosecution wished to do a location visit to the Belanglo State Forest where the bodies of the victims, which the accused was alleged to have killed, were found. Crown wished to show that the forest was secluded, there was little road access, and any person who went there for the first time would not know how to get around.
- Issues:
    - Whether Milat was able to attend. He would have been in handcuffs and escorted by guards. At trial he was not handcuffed. The court had to decide whether this prejudice would outweigh the probative value of the visit.
    - Whether the crime scenes had been materially altered and whether this could be overcome. Materially different to when the alleged offences had occurred.
    - s 53(3)(c) EA the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time.
- **Held:** Where location evidence is conducted, defendant must be given the opportunity to attend. The court held that the **probative value outweighed the prejudice** and held that directions and warnings could be given to the jury regarding this.

R v Bilal Skaf, R v Mohammed Skaf [2004] **(location visit)**

- **Facts:** Two appellants were convicted of aggravated sexual assault. Identification and the adequacy of lighting in the park enabling the complainant to see her assailants were relevant issues in the trial. Ground no 6: Ground for a appeal that the trial was miscarried as a result of juror misconduct. Two jurors **attended the park at night** where they checked out the lighting and conducted experiments with each other at different places in the park to see whether they could see each other. This was during the deliberation. The juror went to the BBQ and disclosed this to a solicitor. The council had added additional lighting once the incident occurred.
- Held:
    - CCA: the experiments **could not be considered** part of the jury's deliberations and **evidence** as to what occurred at the park was **inadmissible**.
    - Evidence was obtained in circumstances amounting to procedural unfairness (denial of natural justice) as the accused were unable to test the material in any way. A new trial was ordered as the Court could not be satisfied that the jurors' conduct has not affected the verdict and the jury would have returned the same verdict if the jurors' had not visited the park.

Evans v R [2007] **(demonstration)**

- **Facts:** Court needed to consider whether getting Evans to dress up and walk around could be construed as a demonstration. If so, it would be

a) Evidence of a previous representation adduced by a defendant will be given by <INSERT PERSON>, a person who saw, heard or otherwise perceived the representation being made, s 65(8)(a) EA or
b) Document tendered as evidence by a defendant contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation s 65(8)(b) EA.

Additionally, <INSERT PARTY> has complied with the notice requirements pursuant to s 67 EA. Therefore, <INSERT REPRESENTATION> is admissible (*Puchalski* 2007)(*Suteski* 2002).

<**YES** – MAKER **IS AVAILABLE** s 66 EA>

On the facts and in accordance with the above EA definition of unavailable persons, <INSERT PERSON>, the maker of the representation is available (*Suteski* 2002).

Pursuant to s 66(2) EA, the hearsay rule will not apply to evidence of the representations made by <INSERT PERSON>, as <INSERT PERSON> was a person who saw, heard or otherwise perceived the representations being made and when made, the occurrence of the asserted fact was fresh in their memory (*Graham* 1998).

In reaching this conclusion of whether or not the occurrence of the asserted fact was fresh in <INSERT PERSON's> memory, the court would have particularly taken in account the following pursuant to s 66(2A) EA:

a) The nature of the event concerned, s 66(2A)(a) EA AND
b) The age and health of the person, s 66(2A)(b) EA AND
c) The period of time between the occurrence of the asserted fact and the making of the representation s 66(2A)(c) EA.

Therefore, <INSERT REPRESENTATION> is admissible (*Suteski* 2002).

atmosphere where the presumption of innocence tends to be replaced by a presumption of guilt' (*Perry* 1982). Therefore, it is arguable that the coincidence evidence has significant probative value (*Ellis* 2003)(*Lock* 1997).

Thus, pursuant to s 98 EA, it is likely that the court will similarly deem the coincidence evidence as having significant probative value (*Ellis* 2003).

<3. PROBATIVE VALUE MUST OUTWEIGH PREJUDICIAL EFFECT>

**This is a balancing exercise*

On the facts, it is unlikely that the jury would act on the evidence, giving effect to 'some irrational, emotional or illogical response' or 'give the evidence more weight then it truly deserves' (*Suteski* 2002). Therefore there is arguably no danger that the tribunal will use the evidence upon a basis logically unconnected with the issues in the case (*Lockyer* 1996).

Thus, pursuant to s 101(2) EA, the prosecutions coincidence evidence can be used as the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

*NOTE: do not ask court to exclude evidence under s 135(1)(a) EA, as evidence has gone through s 101 EA (which is a higher threshold than s 135 EA). You may still try and exclude evidence under s 135(1)(b) or (c) EA.

<4. CONCLUSION>

Therefore pursuant to s 98(1) EA, it is improbable that the events occurred coincidentally. As <INSERT PARTY> has complied with both s 98(1)(a) and s 98(1)(b) as well as s 101(2) EA, coincidence evidence of the events concerning <INSERT WITNESS> is admissible.

Warnings, Comments & Directions

Before excluding the evidence, the Court should consider the possibility of eliminating or reducing the danger of unfair prejudice by giving appropriate directions to the jury (*TKWJ* 2002).

However it is important to note that the more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings (*KRM* 2001).

1. Leave, permission or direction may be given on terms (s 192 EA)

The court is afforded the power under s 192(1) EA to give any leave, permission or direction as the court sees fit. Prior to giving leave, permission or direction the court will consider the following factors in accordance with s 192(2) EA <INSERT FACTORS>

a) The extent to which to do so would be likely to add unduly to, or to shorten, the **length of the hearing**, s 192(2)(a) EA and
b) The extent to which to do so would be **unfair to a party** or to a witness, s 192(2)(b) EA and
c) The **importance of the evidence** in relation to which the leave, permission or direction is sought, s 192(2)(c) EA and
d) The nature of the proceeding, s 192(2)(d) EA and
e) The power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence s 192(2)(e) EA.

On consideration of the above facts and pursuant to s 192 EA, the court would likely give <INSERT PARTY> leave, permission or direction.

2. Comment on failure to give evidence (s 20 EA)

<COMMENT ABOUT DEFENDANT>

Pursuant to s 20 EA, as this is a criminal proceeding for an indictable offence, the judge or any other party <INSERT PARTY> may comment on a failure of <INSERT DEFENDANT> to give evidence (*Weissensteiner* 1993)(*Jones* 1959).

However in accordance with s 20(2) EA, the comment must not suggest that <INSERT DEFENDANT> failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned (unless the comment was made by another defendant) (*Weissensteiner* 1993). In other words, no adverse inference should be drawn from the <INSERT PARTY> comment or the <INSERT PARTY> decision to remain silent. (*Jones* 1959)

<COMMENT ABOUT DEFENDANT'S PARTNER / PARENT OF DEFENDANT>