Court of Appeal for Saskatchewan
Docket: CACV4157

Citation: *Cosgrove v Saskatchewan Government Insurance*, 2025 SKCA 56
Date: 2025-06-04

Between:

Melissa Cosgrove

Appellant
(Appellant)

And

Saskatchewan Government Insurance

Respondent
(Respondent)

Before:	Tholl, McCreary and Drennan JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Justice Meghan R. McCreary
In concurrence:	The Honourable Justice Jerome A. Tholl The Honourable Justice Jillyne M. Drennan
On appeal from:	2023 SKAIA 6
Appeal heard:	September 13, 2024
Counsel:	Reginald Sauer, Kevin Mellor and Moira Keijzer-Koops for the Appellant Ryan Kitzul for the Respondent

McCreary J.A.

I. INTRODUCTION

[1] Bradley Cosgrove was the sole occupant of his pickup truck when he rear-ended his own parked heavy-duty work truck on the night of December 30, 2019, and was killed. Initially, Saskatchewan Government Insurance [SGI] agreed to pay death benefits to his spouse, Melissa Cosgrove, under *The Automobile Accident Insurance Act*, RSS 1978, c A-35 [*AAIA*]. However, after receiving the coroner's report, which concluded that Mr. Cosgrove's death was a suicide, SGI revoked its decision to pay benefits, pursuant to s. 107(1) of the *AAIA*. That section provides that no benefits are payable to an insured when their death results from suicide.

[2] Ms. Cosgrove appealed the denial of benefits to the Automobile Injury Appeal Commission [Commission], but the Commission denied her appeal: *Cosgrove v Saskatchewan Government Insurance*, 2023 SKAIA 6 [*Decision*]. With leave, she now appeals to this Court pursuant to s. 194(1) of the *AAIA*, which provides a right of appeal from the Commission on a question of law only.

[3] Ms. Cosgrove argues, among other things, that the Commission erred in law by failing to apply the common law presumption against suicide, which required SGI to prove, on a balance of probabilities, that Mr. Cosgrove died by suicide. Ms. Cosgrove contends that this error tainted the Commission's application of the onus and burden of proof, as well as its analysis of the evidence and its ultimate findings of fact.

[4] SGI agrees that it was an error for the Commission to discount the presumption against suicide. However, it says that, because SGI accepted that it bore the persuasive burden in any event, the error had no effect.

[5] For the reasons that follow, I would dismiss Ms. Cosgrove's appeal. The Commission erred when it determined that it need no longer apply the common law presumption against suicide. However, this error was of no consequence because SGI accepted that it bore the persuasive burden to prove that Mr. Cosgrove had died by suicide on a balance of probabilities. The Commission did

not err when it found that SGI had met that persuasive burden and concluded that Mr. Cosgrove had died by suicide.

II. BACKGROUND

A. Evidence from the Commission hearing

[6] Mr. Cosgrove died on December 30, 2019 when he drove his personal truck at a high rate of speed into the rear of his heavy-duty work truck, which was parked on a residential street in front of his girlfriend's house.

[7] Mr. Cosgrove's cause of death was consistent with the severe trauma of a motor vehicle collision. The postmortem toxicology report also recorded a blood alcohol level of 40 mmol/L (180 mg%), more than twice the legal limit, but contained no mention of any substance other than alcohol in his system.

[8] In 2017, Mr. Cosgrove separated from his wife, Ms. Cosgrove, after 16 years of marriage. Their separation had been preceded by marital difficulties pertaining to Mr. Cosgrove's behaviour and mental health issues.

[9] Ms. Cosgrove testified that Mr. Cosgrove's relationship with her and their children was manipulative. She said that he would often text the children while he was drunk. She testified that prior to their separation, Mr. Cosgrove had made comments to the effect that he could not live without her or that, if she left him, he would kill himself, but this was part of his attempts to manipulate her.

[10] On the day following the parties' separation, Mr. Cosgrove voluntarily checked himself into a mental health facility. He communicated to medical staff that he wanted to end his life and had considered driving his vehicle into something. Mr. Cosgrove remained in the hospital for approximately one week, and by the end of his time there he reported no longer wanting to die by suicide. He told medical staff that his suicidal ideation was a cry for help. He was advised to attend counselling and take antidepressant medication. He attended as an outpatient at the mental health clinic six times following his discharge from the hospital. His last visit was October 16, 2019, at which time his antidepressant medication was reduced.

[11] At some point later, Mr. Cosgrove began dating Krista Martin. On the evening of Mr. Cosgrove's death, Mr. Cosgrove and Ms. Martin were drinking at the town bar for several hours. They left around 7:30 p.m., when Ms. Cosgrove arrived at the bar. They then returned to Ms. Martin's house, but they had an argument because Mr. Cosgrove wanted to continue drinking and Ms. Martin wanted him to stop. Ms. Martin expressed to Mr. Cosgrove that she was done with his drinking and wanted to break up with him. Around 8:00 p.m., Mr. Cosgrove left, went to a friend's shop, and continued drinking.

[12] Ms. Martin texted and called Mr. Cosgrove many times after he left, but he did not answer. She asked her son to message him, which he did at 11:14 p.m., saying: "my mom wants u to call her". Mr. Cosgrove responded:

> LISTEN rylen. I am trying my best to make things work. I am trying to do the right thing. I love you and your mother and will be there. Right now I ami am [sic] dark place.

[13] Beginning at 11:24 p.m., a text message exchange took place between Mr. Cosgrove and Ms. Martin. There was a time stamp at the beginning of the exchange, but no time stamps throughout, nor at the end. Mr. Cosgrove died 19 minutes after this exchange began, but the exact times of the text messages between Mr. Cosgrove and Ms. Martin are unknown. The exchange was as follows:

11:24 p.m.	
Mr. Cosgrove:	Goodbye. Love you
Ms. Martin:	Done trying can't do this to myself anymore
Mr. Cosgrove:	Yea
Ms. Martin:	Yes
	U can go hurt someone else
	I will always be here as a friend but not allowing anyone to hurt me anymore
Mr. Cosgrove:	Good bye
Ms. Martin:	Bye.
	I hope you find your true love
Mr. Cosgrove:	Watch
Ms. Martin:	I love and always will but I can't be treated like this. I can't allow it anymore
	Watch what
	I don't know how to help you
Mr. Cosgrove:	Fuckoff

Ms. Martin: What
If u want to talk I am here

[14] Ms. Martin testified that, after receiving the "watch" text, she was worried Mr. Cosgrove might hurt himself, so she went out in her car to find him. She stopped at Mr. Cosgrove's home and spoke to him, asking for his keys. Mr. Cosgrove reportedly pushed Ms. Martin, told her to move, and left in his truck. The Commission inferred that this occurred around 11:30 p.m. The Commission noted that, in Ms. Martin's police statement, the order of these events was slightly different—in her statement she said that the "watch" message came after she confronted him at his house. However, the Commission made little of this discrepancy.

[15] After Mr. Cosgrove left his home, he drove to the R.M. office and parked in front of it. Ms. Martin followed him. When she pulled up beside his truck, he accelerated rapidly, drove several blocks at high speed, and collided with his work truck, which was parked in front of Ms. Martin's home. Ms. Martin witnessed the collision. She testified that she did not see Mr. Cosgrove brake prior to the collision or see brake lights operate on his vehicle. She called 911 at 11:44 p.m. The Commission inferred that the motor vehicle collision occurred at 11:43 p.m., plus or minus one minute.

[16] Meanwhile, Ms. Cosgrove, having left the town bar, had also driven past the R.M. office and noticed Mr. Cosgrove's truck parked there. Within minutes, she received a text message at 11:41 p.m. from Mr. Cosgrove, which read:

Goodbye by [*sic*] love
Say goodbye to your brother and sisters. I love you

[17] Ms. Cosgrove was concerned by the text message and she phoned a friend who told her to call 911 in case Mr. Cosgrove had done "something stupid".

[18] Ms. Cosgrove was a member of the volunteer fire department. At 11:49 p.m., she received a text message in that capacity, indicating that there had been a motor vehicle accident in town. She did not respond. At 11:53 p.m., she called 911 to report a potential suicide, but at this point Mr. Cosgrove was already deceased. While on the telephone with 911, Ms. Cosgrove returned to town and saw emergency vehicles at the scene of the motor vehicle collision. She learned of Mr.

Cosgrove's death and left the scene to go home to tell her children. She declined to give a statement to the RCMP that evening, but did provide a statement the next evening.

[19] In her statement to police, Ms. Cosgrove said that when Mr. Cosgrove texted her "goodbye my love" she knew something was wrong. When he texted her "Say goodbye to your brothers and sisters. I love you", she called 911. She described Mr. Cosgrove's mental health issues to the police and told them that, after they separated, he had become suicidal. She also said that her children had told her that Mr. Cosgrove was miserable at Christmas and was not himself in the week prior to his death. She reported that they were supposed to see a lawyer about their separation in January, and that it was not going well. She further reported that she had recently told a friend that she was worried about Mr. Cosgrove. She said that he had previously threatened to end his own life. She also said that she was not surprised that he had died by suicide.

[20] At the hearing, Ms. Cosgrove gave evidence that, when she called 911 on the night of Mr. Cosgrove's death, she only said she was concerned about suicide to get a quicker response to her complaint that Mr. Cosgrove was driving while impaired. She said that her friend had suggested that Mr. Cosgrove might commit suicide, but she, herself, was not worried about that. Rather, she was concerned about Mr. Cosgrove's safety more generally. She said that she was in a poor mental state when she gave her statement to police, and did not recall all the things she told them.

[21] Ms. Martin also provided a statement to the police after the motor vehicle collision. She told the police that around Boxing Day, Mr. Cosgrove's mental health deteriorated, and he had been crying on and off.

[22] In addition to the text messages he sent to Ms. Martin and Ms. Cosgrove, Mr. Cosgrove also sent text messages to two of his children on the evening of his death. The relevant messages were:

9:06 p.m.	
Mr. Cosgrove:	Just somebody wondering. Ge said you were 13 and playing with the big boys. Proud of you. I knew you would do well. Just keep your head on.
Child:	I was okay.
	Shot one 10 feet over tho.

Mr. Cosgrove:	Ha. You'll get it harnessed my boy. Love you
Child:	lve you too
Mr. Cosgrove:	I'm so sorry about xmas and yelling at you
	I love you and your sisters more than anyb6
	Anything
	I
	Goodbye my champ

[23] The text message exchange with the other child was:

11:19 p.m.	
Mr. Cosgrove:	I love guys
Child:	your gay?
Mr. Cosgrove:	I love you and your siblings more than anything. I wish you the best.
Child:	love you to

[24] Constables Calvin Tsang and Veronique Richard of the RCMP gave evidence at the hearing respecting their investigation of the motor vehicle collision. They arrived at the scene at 12:25 a.m. and arranged for firefighters to block off the street, after which they photographed the scene and arranged for an accident reconstruction expert, coroner, tow truck driver, and funeral home to attend.

[25] Constable Tsang took statements from several people who had been with Mr. Cosgrove on the evening of his death. The Commission gave little weight to these statements because these individuals did not testify at the hearing. However, the Commission did note that the statements were similar, and corroborated the evidence of, Ms. Cosgrove and Ms. Martin.

[26] There was evidence at the hearing that Mr. Cosgrove could not see without his eyeglasses. The Commission noted that Cst. Tsang had made no attempt to locate Mr. Cosgrove's eyeglasses after the collision, but acknowledged that this was due to Cst. Tsang working to rule out criminal activity, rather than attempting to prove or disprove a suicide. Further, the photographs from the motor vehicle collision demonstrated the significant force of the collision. The Commission inferred that the force required to cause Mr. Cosgrove's head injury would have dislodged Mr. Cosgrove's eyeglasses had he been wearing them. Because the police officers made no attempt

to locate the eyeglasses, the Commission concluded that there was no evidence to allow it to determine whether Mr. Cosgrove was wearing his eyeglasses at the time of the collision.

[27] Corporal Adele Breen, an RCMP accident reconstruction expert, gave evidence respecting her conclusions as to how the collision occurred. She opined that Mr. Cosgrove was not wearing his seatbelt, and that he did not brake prior to the collision. She further opined that Mr. Cosgrove was accelerating immediately before the collision, based on the eventual resting places of the two vehicles. Because the forward motion of the work truck was stopped by a tree, Cpl. Breen could not calculate the exact speed that Mr. Cosgrove was travelling at the point of impact, but she said it was at least 75 km/h in a 40 km/h zone. Based on the tire tracks, she testified that Mr. Cosgrove drove directly into the work truck without braking or attempting to take evasive action. Due to the damage to the front-end of Mr. Cosgrove's personal truck, Cpl. Breen could not determine whether the headlights were on at the time of impact.

[28] Although it was winter, Cpl. Breen concluded that weather and road conditions were not a factor in the collision, nor were there any visibility issues other than the fact that it was night. The Commission accepted Cpl. Breen's evidence.

[29] Finally, Dr. J. Steven Richardson was tendered by Ms. Cosgrove as an expert witness to provide an opinion on Mr. Cosgrove's cause of death. He provided a report dated April 8, 2022, in which he concluded that it was more likely that the motor vehicle collision was due to Mr. Cosgrove's impairment than it was due to suicide.

[30] The Commission gave no weight to Dr. Richardson's opinion, concluding that his report did not provide a clear factual basis for the opinion, and did not speak to how an expertise in pharmacology provided Dr. Richardson with any greater insight into interpretation of the text messages, psychiatric evaluations, and reports describing the conditions at the scene of the collision than it did the Commission. The Commission further noted that Dr. Richardson's report did not consider relevant circumstantial evidence and that Dr. Richardson did not have the benefit of the evidence from witnesses who testified at the hearing when he formed his opinion.

B. The *Decision*

[31] The Commission identified that its challenge in rendering a decision was to discern Mr. Cosgrove's state of mind, based on the evidence, to determine whether his death was a suicide. The Commission noted that it had considered the chain of events as a whole, acknowledging that there was evidence to support both Ms. Cosgrove's theory that the motor vehicle collision was an accident, and SGI's theory that it was a suicide.

[32] The Commission did not accept Ms. Cosgrove's evidence that when she called 911 on the night of Mr. Cosgrove's death to express her concern that Mr. Cosgrove might end his own life, she only did so to get a quicker response. The Commission found that Ms. Cosgrove was a responsible person who would not make a false report. It concluded that her explanation at the hearing respecting her 911 call was an attempt to distance herself from expressing the belief that Mr. Cosgrove had died by suicide (*Decision* at para 49). The Commission sympathized with the trauma that Ms. Cosgrove had experienced but noted that a statement given shortly after the incident should bear substantial weight, as it generally should be more reliable than later recollections.

[33] While the Commission acknowledged counsel's argument that the RCMP officers who took Ms. Cosgrove's statement planted the suggestion with her that Mr. Cosgrove had died by suicide, the Commission dismissed this contention. It found that because Ms. Cosgrove called 911 to report a possible suicide before she knew that Mr. Cosgrove had died, this demonstrated that she was concerned that Mr. Cosgrove may commit suicide before she gave her statement to police (*Decision* at para 56).

[34] Mr. Cosgrove's alleged manipulative nature was central to Ms. Cosgrove's theory that his death was accidental. Ms. Cosgrove contended that the final text messages were Mr. Cosgrove's way of seeking attention, and did not demonstrate an intention to commit suicide. Ms. Cosgrove argued that it was an unfortunate coincidence that the collision occurred just after Mr. Cosgrove sent the attention-seeking text messages, but that this sequence of events did not prove that he died by suicide.

[35] In contrast, SGI argued that Mr. Cosgrove had longstanding mental health issues, and there was evidence of significant stressors over Christmas, such that Mr. Cosgrove was at an increased risk for suicide. SGI contended that the text messages sent in the last 30 minutes before his death must be interpreted as Mr. Cosgrove saying his final goodbyes: the messages were a clear indication of his intention to commit suicide and, because his death followed, it must be inferred to have been intentional.

[36] The Commission decided, on a balance of probabilities, that the motor vehicle collision was intentional. As such, they upheld SGI's decision to terminate Ms. Cosgrove's family's benefits. While the Commission commented that there was no single piece of evidence that was determinative, when taken together, it was satisfied that the death was a suicide.

[37] The Commission inferred that Mr. Cosgrove's mental health issues were the cause of the breakdown of his marriage, and that the separation exacerbated those symptoms to the point that he sought treatment for suicidal ideation. His medical records suggested that he had previously considered ending his own life by colliding his vehicle with another vehicle. Although Mr. Cosgrove seemed to have been recovering from his depression, the Commission pointed to evidence suggesting that he had regressed at Christmas of 2019.

[38] The Commission found that on the night of the motor vehicle collision, Mr. Cosgrove was at an increased risk of suicide due to alcohol consumption and relationship factors. It concluded that the dominant tone of the final text messages he sent that night, interpreted in the context of his death minutes later, were of "saying goodbye" (*Decision* at para 172). The circumstance of the motor vehicle collision, itself – the fact that Mr. Cosgrove accelerated directly into his own work truck without braking or attempting to swerve – was another factor that weighed towards suicide. The fact that Ms. Cosgrove, Ms. Martin, and the friend who told Ms. Martin to call 911 all expressed concern about suicide that night was of some weight. The Commission inferred from this evidence that Mr. Cosgrove's risk of suicide was a realistic concern to these witnesses prior to the motor vehicle collision.

[39] The above factors, in the Commission's view, demonstrated Mr. Cosgrove's intent to commit suicide, followed by the execution of a deliberate act to kill himself. While the

Commission noted that each factor, alone, was deserving of little weight, taken together, these factors demonstrated that Mr. Cosgrove had died by suicide on a balance of probabilities.

[40] The text messages were particularly significant for the Commission. While Mr. Cosgrove said "goodbye" to two of his children, the Commission determined that those messages did not weigh heavily in the direction of either accident or suicide. The Commission acknowledged that Mr. Cosgrove told Ms. Martin's son that he was in a "dark place," which indicated a depression, but also that he told him he would "be there," which suggested he was not contemplating suicide. However, the Commission noted that Mr. Cosgrove said "goodbye" to Ms. Martin and to Ms. Cosgrove. It stated that while "goodbye" does not always mean a person is going to commit suicide, in the context of Mr. Cosgrove's sudden and unexpected death minutes later, the "goodbye" messages could be understood as a final goodbye. The Commission concluded that the circumstances of the motor vehicle collision itself – which included that Mr. Cosgrove made no attempt to swerve, no attempt to brake, accelerated at the time of impact, there was no offset to the impact, there were no extraordinary environmental issues, and the work truck was large and visible – demonstrated that the collision was intentional, rather than accidental, and particularly in the context of the text messages sent just before the collision.

[41] Finally, the Commission determined that because Mr. Cosgrove had the visual acuity to see Ms. Martin pull up beside him and to text her and to text Ms. Cosgrove, he must also have had the visual acuity to see the work truck and to attempt to avoid it. The evidence did not support that he drove into the work truck without seeing it.

[42] Given all these factors, the Commission concluded that the motor vehicle collision was intentional and that Mr. Cosgrove had died by suicide.

III. JURISDICTION AND STANDARD OF REVIEW

[43] This Court has jurisdiction to hear an appeal from the Commission on a question of law only: *AAIA*, s. 194(1).

[44] Questions of law are reviewable on a correctness standard: *Housen v Nikolaisen*, 2002 SCC 33 at para 8, [2002] 2 SCR 235; *Van de Sype v Saskatchewan Government Insurance*, 2020 SKCA 18 at para 67 [*Van de Sype*].

[45] In this case, there is no right of appeal respecting an issue of fact, or of mixed fact and law where the alleged error is not an extricable question of law. Therefore, any issue regarding the weight assigned to the evidence, or the inferences to be drawn from it, are not reviewable by this Court unless the Commission's finding: (a) is based on no evidence; (b) is made on the basis of irrelevant evidence or in disregard of relevant evidence; or (c) is based on an irrational inference of fact: *Van de Sype* at para 68.

IV. ISSUES

[46] Ms. Cosgrove was granted leave to raise the following issues in this appeal:

(a) Did the Commission err by failing to apply the common law presumption against suicide?

(b) Did the Commission err by misapplying the onus of proof and the burden of proof?

(c) Did the Commission err by making findings of fact that were based on no evidence, irrelevant evidence, or irrational inferences?

(d) Did the Commission err by improperly taking judicial notice of certain facts?; and,

(e) Did the Commission err by failing to draw an adverse inference against SGI?

V. ANALYSIS

A. The presumption against suicide still applies

1. Overview

[47] As I noted, SGI initially approved death benefits payable to Ms. Cosgrove and her children pursuant to Division 5, Part VIII of the *AIAA*, but later decided that no further benefits would be

payable because Mr. Cosgrove's death was a suicide. That decision was made pursuant to s. 107(1), which reads:

> **No benefits for suicide**
>
> **107**(1) No benefits are payable to an insured or to any person claiming through or on behalf of an insured, or as a result of bodily injury to or the death of an insured, if the insured commits suicide or attempts to commit suicide with a motor vehicle.

[48] As such, the key issue on appeal before the Commission was whether Mr. Cosgrove had died by suicide.

[49] The Commission began its analysis by rejecting Ms. Cosgrove's argument that the common law presumption against suicide functioned to place the onus on the party alleging death by suicide and affects the weight of evidence necessary to discharge the onus. The Commission concluded that the common law had evolved to no longer recognize the presumption against suicide. It reasoned that because suicide was no longer a criminal act and did not attract the same negative stigma that it previously had, and because in *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41 [*McDougall*] the Supreme Court of Canada had determined that only one standard of proof applied in a civil proceeding, the presumption against suicide should no longer be applied. The Commission rejected *both* that: (1) the presumption against suicide placed a persuasive burden on the party alleging suicide; and (2) suicide must be proven on a higher standard of proof than the balance of probabilities. It concluded as follows:

> [11] The Appellant put the onus and standard of proof in issue by raising the common law presumption against suicide. It is both a substantive and procedural presumption. The Appellant's brief states:
>
> > In order to rebut the presumption SGI must demonstrate with clear, convincing and cogent evidence that its theory of the collisions proved on the balance of probability and that 'the Appellant's' theories of the accident are not plausible.
>
> [12] The Appellant argues the common law presumption against suicide places the onus on the party alleging death by suicide and impacts the weight of evidence necessary to discharge the onus.
>
> [13] The Appellant cited the following cases in support of its argument: *Vijeyekumar et al v State Farm Mutual Automobile Insurance Company*, 38 OR (3d) 590, [1998] OJ No 426 (ONCA); *Greening v. Commercial Union Assurance*, 29 CCLI 129, 1987 CanLII 3935 (NL CA); *Beckon (Re)*, 1992 CanLII 7707 (ON CA); *London Life Ins. Co. v Trustee of the Property of Lang Shirt Co. Ltd.*, 1928 CanLII 20 (SCC), [1929] SCR 117; *Peters v. Desjardin Securite Financiere et al*, 2015 ONSC 5458. [14] **The Commission concludes the case authority provided by the Appellant is no longer good law.**

> [15] There are several theories supporting the origin of the presumption against suicide. When suicide was a criminal act, it was thought that the standard of proof should be closer to the criminal standard. See for example, *London Life Ins. Co. v Trustee of the Property of Lang Shirt Co. Ltd.* cited above.
>
> [16] More recently, the most quoted decision explaining the rational for the presumption is *Greening v. Commercial Union Assurance*, also cited above. The Court said the presumption was founded on: … the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred.
>
> [17] The Commission finds neither of these policy reasons compelling. Contracts of insurance usually have broad coverage in the insuring agreement. The insurer then reduces risk through exclusions to coverage. There is no sound policy reason for treating a suicide exclusion differently than any other exclusion from coverage. The policy seems to be based on a social convention of shrouding suicide. It was interesting that the junior constable from the small rural detachment who investigated the [motor vehicle collision] said he has had investigated 6 suicides in the last year. There are also policy debates about assisted suicide. All of this to say, we know suicide is an all to common escape. In 2022 suicide is out of the shadows. The greatness of the common law is that is adaptable to social change.
>
> [18] More importantly there is authority to the contrary [citing *McDougall* and *Peters v Desjardins Securite Financiere et al*, 2015 ONSC 5458].
>
> (Emphasis added)

[50] As I will explain, the Commission erred when it concluded that the common law presumption against suicide no longer applies in insurance litigation. The presumption against suicide requires that the party alleging suicide has the onus to prove suicide on a balance of probabilities: it is still good law and it applies in this case. However, Ms. Cosgrove's contention respecting how the presumption against suicide should be applied to the evidence is invalid. The Committee correctly identified that only one standard of proof – proof on a balance of probabilities – applies to evidence in *any* civil case. Thus, while the burden of proof rested with SGI to prove that Mr. Cosgrove had died by suicide, it was only required to prove suicide on a balance of probabilities, given the whole of the evidence.

2. The common law presumption against suicide

[51] The presumption against suicide is a rebuttable presumption of law. The effect of the presumption is to place the persuasive burden on the party alleging suicide to prove that death was caused by suicide. Following *McDougall*, the presumption against suicide does not require that suicide be proved at a higher standard than on a balance of probabilities, nor does it require that any specific piece of evidence be weighed other than in that balance. As in all civil cases, whether

a claim is proven is determined on a balance of probabilities from a consideration of the evidence taken as a whole.

[52] A rebuttable presumption of law applies where, upon proof of the basic fact (or proven fact), another fact is presumed unless the opposite party either: (1) raises a reasonable doubt about the existence of the proven fact; (2) satisfies an evidential burden; or (3) satisfies the persuasive or legal burden of proof (depending upon the particular presumption): Sidney N. Lederman, Michelle K. Fuerst and Hamish C. Stewart, *Sopinka, Lederman & Bryant*: *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at para 4.2 [Sopinka, Lederman & Bryant].

[53] The presumption against suicide arises in the insurance context because, historically, suicide was considered to be unnatural. As such, where the cause of death was uncertain, it was presumed that death was accidental unless the party asserting suicide could prove it as such.

[54] The historical leading case respecting the presumption against suicide is *London Life Ins. Co. v Trustee of the Property of Lang Shirt Co. Ltd.* (1928), [1929] SCR 117 [*London Life 1928*], where the Court relied on a rule of evidence that created a legal presumption against the imputation of crime and held that the same presumption applied to attempted suicide because suicide was a criminal offence at that time. Further, due to the (then) criminal nature of the act, the standard of proof was said to be higher than the civil standard (*London Life 1928* at 126).

[55] More recently, the presumption against suicide has been considered as a longstanding presumption in insurance law: see *Greening v Commercial Union Assurance Co.*, (1987), 68 NFLD & PEIR 41 at para 20, (NLCA) [*Greening*], citing *Dominion Trust Company v New York Life Insurance Co.* (1919) AC 254 at 259; see also *London Life Insurance Company v Chase*, [1963] SCR 207 [*Chase*]; *Tilley v Co-operative Life Insurance Company* [1983] ILR 1-1639. The presumption against suicide was referred to as recently as 2015 in *Peters v Desjardin Securite Financiere et al*, 2015 ONSC 5458 at para 38 [*Peters*], aff'd in *Peters Estate v Desjardin Securite Financiere*, 2016 ONCA 282, when the Court stated that where suicide is alleged, the onus is on the insurer to establish it on a balance of probabilities, and the degree of probability must be high.

[56] Substantively, the presumption against suicide creates a rebuttable presumption that the insured died by means other than suicide. It allocates the *evidential* burden to the insurer to lead

evidence to establish the contrary: *Greening* at para 24. In other words, where the insurer denies benefits based on a suicide exclusion and its decision is challenged, the presumption against suicide becomes operative and the adjudicator is required to presume that the death was not by suicide unless the insurer raises the issue by providing or pointing to some evidence suggesting otherwise (*Greening* at para 24).

[57] Procedurally, the presumption against suicide also places the *persuasive* burden of proof on the party alleging suicide (typically the insurer): *Greening* at para 27. The Court in *Greening* stated that "clear and cogent rebuttal evidence" would be required for the insurer to "tip the balance of probabilities sufficiently to justify a finding of suicide" (at para 24). However, the Court went on to say that the "degree of probability requisite to discharge a burden of proof does vary between different categories of civil cases" (at para 25).

[58] This "sliding scale of proof" has been problematic since suicide was decriminalized. Attempted suicide was decriminalized in 1972, but the Court in *Greening* still stated that the decriminalization of suicide did not change the effect of the presumption (at para 21); a more exacting standard of proof was still required due to the "gravity of the accusation" (at para 25).

[59] As I have already explained, the sliding scale of proof arose, in part, from the criminal nature of the suicidal act: *London Life 1928* at 126. However, in *Hanes v Wawanesa Mutual Insurance Co.*, [1963] SCR 154 at 161–62, the Supreme Court clarified that even in civil cases where it is necessary to establish a breach of criminal law, the standard of proof need not be the same as it would be to secure a criminal conviction. Rather, the standard of proof was on a balance of probabilities (*Hanes* at 164). In *Chase*, the Supreme Court described the process as "weighing the probabilities and improbabilities of the plaintiff's case against those of the case for the defendant…having due regard to the seriousness of the allegation of suicide" (at 211). In short, these cases did not clearly identify what the standard of proof was.

[60] Courts in decisions such as *Greening* continued to agree that the standard was a balance of probabilities, but always with a caveat that the degree of probability needed to be higher due to the gravity of the accusation (*Greening* at para 25, and see *Peters* at para 38). However, this Court did away with the "sliding scale of the standard of proof" in *Lautner Estate v Cumis Life Insurance Co.*, [1992] 3 WWR 577 at paras 5–6 (Sask CA) (per Jackson J.A.):

> [5] We are all of the view that the trial judge misdirected himself as to the burden of proof on Cumis in adducing evidence of suicide. The quotes taken from Norwood *Life Insurance Law in Canada* (Richard De Boo Limited, 1977) at pp. 281–282 and 283–284 overstate the case of *Hanes v Wawanesa Mutual Life Insurance Co.*, 1963 CanLII 1 (SCC), [1963] SCR 154. In *T. Eaton Life Assurance Company v Mitchell*, 1976 CanLII 964 (SK CA), [1977] 1 WWR 420 (Sask. C.A.) Bayda, J.A. (as he then was), referred to the ratio of the *Hanes* case, supra, and stated (at p. 422) **the burden of proof on the party alleging suicide to be the usual burden in civil cases, i.e, on a balance of probabilities.** …
>
> [6] We are of the view that if the trial judge had adopted the burden of proof as elucidated by the T. Eaton case, supra, and if he then would have posed the question to himself as being whether what had occurred was more probably an accident than suicide, it is our view he ought to have concluded it was more probably suicide.
>
> (Emphasis added)

[61] Thereafter, in *McDougall*, the Supreme Court stated unequivocally that even where allegations are extremely serious, there is only one civil standard of proof: the balance of probabilities.

[62] *McDougall* was a civil case in which former students of an Indian residential school raised allegations of sexual abuse. The Court reviewed cases in which the civil standard of proof for particularly grave allegations had been said to be elevated to a degree that is "commensurate with the occasion" (at paras 26–28), as well as cases in which the standard was said to require "greater care" in scrutinizing the evidence (at para 30). The Court rejected these authorities, stating: "once and for all in Canada, … there is only one civil standard of proof at common law and that is proof on a balance of probabilities" (at para 40).

[63] The Supreme Court's justification for the uniform standard of proof was that all evidence must be scrutinized with care, regardless of the gravity of the allegation. Evidence must always be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities standard (*McDougall* at paras 45–46). If it is more likely than not that an alleged event occurred, then the balance of probabilities test is satisfied (*McDougall* at para 49).

[64] To summarize, where insurance benefits are denied due to suicide exclusions, a rebuttable presumption against suicide operates against the insurer and burdens the insurer with proving that the deceased died by suicide on a balance of probabilities. In the absence of evidence to the contrary which satisfies the burden of proof, the trier of fact must conclude that the death was not as a result of suicide. To rebut the presumption, the adjudicator must be satisfied that on the whole

of the evidence it is more probable than not that the death was a suicide. If the evidence equally supports either conclusion, then the presumption against suicide has not been rebutted and the trier of fact must conclude that the death was not by suicide.

3. Evidential versus persuasive burden

[65] I have already determined that the presumption against suicide imposes a persuasive burden on the party alleging suicide to prove that suicide occurred. However, SGI has argued that the presumption against suicide imposes on it *only* an evidential burden, not a persuasive burden, and so I address that argument here.

[66] Sopinka, Lederman & Bryant explain the difference between the evidential burden and the persuasive (legal) burden of proof as follows:

> **3.6**
> As noted, the term "burden of proof" is ambiguous and it has sometimes been used to mean that there is evidence of a fact, while on other occasions it has been used to mean that a fact has been proved by the evidence. If the term is applied without discriminating in which sense the term is being used, it is difficult to determine which burden a party has satisfied in a particular case.
>
> **3.7**
> The term "evidential burden" means that a party has the responsibility to insure [sic] that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue to be considered by the fact-finder.
>
> **3.8**
> In contrast, the term "persuasive (legal) burden" means that a party has an obligation to prove or disprove a fact or issue to the criminal or civil standard. The failure to convince the trier of fact to the appropriate standard means that party will lose on that issue. …
>
> **3.9**
> A party who bears an evidential burden is subject to an adverse ruling for failing to meet the threshold test for that particular fact or issue. In a jury trial, the trial judge has the authority to decide that issue without leaving it for the jury's consideration. However, where a party satisfies an evidential burden, the trial judge must leave that issue for the jury's determination. For example, the incidence of the evidential burden in relation to the definitional elements of a crime in a criminal prosecution or the negligence of the defendant in a civil action, requires the Crown or plaintiff to call evidence at the commencement of proceedings. To satisfy this evidential burden, these parties must adduce some evidence on these issues to succeed on a motion for a non-suit or a directed verdict of acquittal. The trial judge's determination as to the sufficiency of the evidence to satisfy the evidential burden is a question of law.
>
> **3.10**
> The significance of the evidential burden arises when there is a question as to which party has the right or the obligation to begin adducing evidence. It also occurs when a question

> arises whether there is sufficient evidence to raise an issue for determination by the trier of fact…The persuasive (legal) burden of proof normally arises after evidence has been completed and the question is whether the trier of fact has been persuaded with respect to the issue or case to the civil or criminal standard of proof. The persuasive (legal) burden, however, ordinarily arises after a party has first satisfied an evidential burden in relation to that fact or issue.

[67] SGI maintains that the presumption against suicide allocates only an evidential burden on it as the insurer, requiring it merely to demonstrate a threshold standard of proof. It says that it successfully rebutted the evidential presumption in this case by introducing some evidence to suggest that Mr. Cosgrove died by suicide, and thereafter the presumption against suicide had no further application.

[68] I am not persuaded by SGI's argument on this point. In my view, the presumption against suicide allocates a persuasive burden which can only be displaced by proving, on the whole of the evidence, that death was caused by suicide on a balance of probabilities. While not in the suicide/insurance context, the well-known decision of *Pecore v Pecore*, 2007 SCC 17 at para 44, [2007] 1 SCR 795, describes how rebuttable presumptions operate:

> [44] As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

[69] Ms. Cosgrove points out that she did not need to provide any proof of accidental death for the presumption against suicide to arise. She is correct. The presumption against suicide is the starting point. It shifts the burden of persuasion to the insurer to rebut it on a balance of probabilities. If the insurer does not displace the presumption, the court is bound to conclude that the death was not as a result of suicide (*Pecore* at para 22). Further, if the evidence does not weigh in either direction (in other words, if the evidence points equally to accident and suicide), then a finding of accidental death must be made (see *Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43 at para 34).

[70] SGI cites the dissenting reasons in *New York Insurance Co. v Schlitt*, [1945] 2 DLR 209, (SCC), as standing for the principle that as soon as suicide becomes a reasonable conclusion or counterbalances the presumption against it, the presumption is no longer operative. However, Rand

J.A. pointed out in *Schlitt* that the primary question still must be answered in each circumstance—that is, does the specific presumption at play raise a persuasive burden of proof, or does it require "merely the neutralizing of the fact presumed in the framework of the existing onus" (at 308).

[71] While much of the case law respecting the presumption against suicide is dated, and/or has been overturned (especially in respect of the sliding scale of proof), it is my view that due to the gravity of the allegation of suicide, and the historical judicial treatment of the presumption against suicide, the presumption against suicide must allocate a persuasive burden. The presumption is not displaced from the outset by the insurer bringing "some" evidence of suicide. The presumption operates throughout and can only be displaced by proving suicide on a balance of probabilities. Indeed, *Greening* states unequivocally that the presumption against suicide allocates the burden of proof (at paras 24–27).

[72] In summary, the Commission erred when it suggested that the common law presumption against suicide is no longer law. The presumption against suicide remains a valid common law presumption and the persuasive burden rests with the party who asserts that the death was a suicide to prove suicide on a balance of probabilities.

[73] However, while the Commission erred by finding that the presumption against suicide no longer applies, this was ultimately a legal error without consequence. This is because SGI conceded at the Commission hearing that it bore the onus of proof on a balance of probabilities because it had reversed its decision to provide benefits. When SGI has initially approved the payment of benefits to a claimant and subsequently reverses its decision, it is required to prove that benefits are no longer payable: *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 at para 14, 457 Sask R 254, citing *Collis v Saskatchewan Government Insurance*, 165 Sask R 108 (QB), and *Job v Saskatchewan Government Insurance*, 2004 SKCA 164, 257 Sask R 85.

B. The Commission correctly applied the onus and burden of proof

[74] Ms. Cosgrove contends that by not applying the presumption against suicide, the Commission misconstrued the onus and burden of proof. However, I am not persuaded that the Commission erred in this way.

[75] Ms. Cosgrove says that she presented two plausible theories supporting her position that the motor vehicle collision was an accident. First, that Mr. Cosgrove was intoxicated, and it was his severe impairment which caused him to crash his truck. Second, that the "goodbye" text messages he sent were consistent with his manipulative behaviour, not an intention to end his own life. Ms. Cosgrove contends that if her theories were plausible, then applying a standard of proof on a balance of probabilities, the presumption against suicide dictates that the collision must have been an accident, not a suicide, because any plausible inference that could be drawn from the evidence other than suicide should have been accepted.

[76] On this point, the Commission concluded (*Decision* at para 27):

> [27] In summary, each party has an obligation to adduce the evidence within its power that supports its causal theory. Each party also has an obligation to contradict evidence relied on by the opposite party. The Commission weighs the evidence it hears and is entitled to make inferences. The Commission, then determines which of the causal theories is supported by the totality of evidence and most likely to have occurred. If the evidence is equal the decision goes to the party that does not have the onus of proof. Adopting Mr. Sauer's helpful baseball analogy, a tie goes to the runner.

[77] Here, the Commission characterized the persuasive burden correctly. While it did not mention the presumption against suicide, it applied the onus of proof that flows from it, and the burden of proof attached to it. Again, simply put, SGI bore the onus of proving suicide, and, for its theory of the case to be accepted, it was required to prove that its contention that this was a suicide was more likely than not.

[78] Ms. Cosgrove cites several cases for the proposition that when the circumstances of death could be consistent with death being an accident, or not being a suicide, then the application of the presumption against suicide means that the death should be presumed to be accidental/not caused by suicide. Nevertheless, in this case, the Commission did not find that the circumstances of what occurred on the night Mr. Cosgrove died were consistent with his death being accidental. Rather, the Commission determined that the inferences to be drawn from the evidence demonstrated that it was more likely than not that Mr. Cosgrove had died by suicide. In other words, the inferences to be drawn from the evidence were *not* equally consistent with Mr. Cosgrove's death being accidental.

[79] Ms. Cosgrove also argues that while the burden of proof falls on SGI to establish suicide on a balance of probabilities, to meet that burden SGI must also establish that "no other plausible explanations exist".

[80] With respect, this is not the effect of the presumption against suicide. As I have explained, while it is correct that the party alleging suicide bears the onus of establishing it on the balance of probabilities, this does not mean that it must also prove that no other plausible inferences could arise from the evidence. In law, probability is distinct from plausibility. Proof on the balance of probabilities requires that the thing that is alleged has been proven to have occurred at a certainty beyond 50%. It does not mean that all other plausible explanations must be convincingly disproved. Where there are two reasonable explanations, but one satisfies the balance of probabilities standard, then that explanation has a greater probability than any other and is, therefore, proven.

[81] To be clear, the presumption against suicide does not import some type of new rule of evidence, requiring the party with the onus of proof to demonstrate that the only rational inference that can be drawn from the evidence is that suicide occurred. On the contrary, the Supreme Court was clear in *McDougall* that in a civil case, such as this one, there can be only one standard of proof applied to the evidence – regardless of whether that evidence is direct or circumstantial. There is no additional burden placed on the party bearing the onus, other than to demonstrate proof on a balance of probabilities. A civil standard of proof is distinctly different than the criminal standard where the Crown may be required to dispel the existence of rational inferences inconsistent with guilt, such as in *R v Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000, in order to prove beyond a reasonable doubt that a criminal offence has been committed.

[82] In sum, the correct application of the presumption against suicide does not require a finding in favour of accidental death just because there are reasonable inferences that can be drawn from the evidence which might support that death was not by suicide. On the contrary, it merely requires that the party alleging suicide prove it on a balance of probabilities on the whole of the evidence. In this case, the Commission found that the evidence demonstrated, on a probability greater than 50%, that Mr. Cosgrove's death was a suicide. It therefore found that SGI had discharged its onus

and its evidentiary burden and proved that Mr. Cosgrove had died by suicide. I am not persuaded that the Commission erred in law when reaching this conclusion.

C. The Commission's alleged errors of fact do not constitute errors of law

1. Overview

[83] Ms. Cosgrove takes issue with several of the Commission's findings of fact, arguing that the Commission erred by not considering the evidence in light of the presumption against suicide. Relying on *Vijeyekumar v State Farm Mutual Automobile Insurance Co.*, 38 OR (3d) 590 (CA), Ms. Cosgrove contends that while the standard of proof in all civil cases is proof on a balance of probabilities, in cases involving an allegation of suicide "…the seriousness of the wrong alleged and the gravity of the consequences are circumstances to be taken into account in determining whether the evidence in any given case is of sufficient weight to meet the standard". Ms. Cosgrove expands upon this reasoning to argue that the trier of fact must weigh and consider the evidence keeping as its foremost consideration that "[t]he evidence contradicting an accident had better be convincing with no other plausible explanation".

[84] Ms. Cosgrove argues that the evidence she presented to support the theory that the collision was accidental is equally consistent with the evidence of suicide, in which case the presumption against suicide must be applied to interpret the evidence to deem the collision an accident. She alleges that the Commission made "a number of critical errors in the analysis of the evidence" by failing to do this, resulting in its erroneous finding that Mr. Cosgrove's death was a suicide.

[85] While there is no right of appeal from the Commission to this Court on a question of fact or a question of mixed fact and law, Ms. Cosgrove argues that the Commission misapprehended the evidence in such a manner that it rises to an error of law. Specifically, she argues that the Commission misapprehended: (1) the evidence of Ms. Martin respecting the timing of the text messages and events immediately preceding Mr. Cosgrove's death; (2) the meaning of Mr. Cosgrove's text messages; (3) the evidence of Cpl. Breen, the RCMP accident reconstructionist; (4) the evidence of Mr. Cosgrove's medical history and his prior suicidal ideation; (5) the reliability of Cst. Tsang and Cst. Richard's evidence; and (6) the weight to be given to Dr. Richardson's evidence.

[86] In my view, none of these errors alleged by Ms. Cosgrove give rise to extricable questions of law. The Commission's findings of fact were supported by the evidence and its inferences were not irrational. This Court must not translate disagreements with the Commission's factual findings and inferences into legal errors. The Commission was entitled to assign weight to the evidence it considered most relevant, and to draw reasonable inferences from the evidence. I will explain further.

2. When a factual finding rises to an error of law

[87] Findings of fact can give rise to a question of law when there was no evidence before a tribunal that, reasonably viewed, could be capable of supporting the tribunal's finding: *City of Regina v Kivela*, 2006 SKCA 38 at para 49. In the civil context, this Court concluded that a tribunal errs in principle, committing an error of law, when it makes a factual finding: (a) based on no evidence or irrelevant evidence, (b) in disregard of or mischaracterization of relevant evidence, or (c) which draws irrational or unfounded inferences from the evidence: see *PSS Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 at para 68; see also *Johannson v Saskatchewan Government Insurance*, 2019 SKCA 52 at paras 24–25; and *Murphy v Saskatchewan Government Insurance*, 2008 SKCA 57 at para 5, 310 Sask R 149.

3. The Commission did not materially misapprehend the evidence

[88] I have already explained that the Commission allocated the persuasive burden correctly, despite its error in determining that the presumption against suicide did not apply. I have also rejected Ms. Cosgrove's contention that the presumption against suicide requires a trier of fact to consider and eliminate any reasonable inferences that can be drawn from the evidence that suicide did not occur. Again, what the presumption against suicide requires is that the party alleging suicide bears the onus of proving, on the whole of the evidence, that death was caused by suicide on a balance of probabilities. It does not require that individual pieces of evidence be considered with the presumption against suicide influencing the weight to be given to a specific piece of evidence, or the inference that might be drawn from it. As such, I do not accept that the Commission's error in rejecting the presumption against suicide caused it to misapprehend the evidence, or to make a factual decision based on no evidence, irrelevant evidence, or an irrational inference because it did correctly apply the persuasive burden. The Commission correctly noted

that it had to consider the evidence as a whole to determine whether Mr. Cosgrove intended his own death (*Decision* at para 130). No error of law arises, here.

[89] The Commission summarized the factors upon which it based its conclusion that Mr. Cosgrove died by suicide, as follows (*Decision* at paras 170–75):

> [170] There is no one piece of evidence that is determinative of the Deceased's intention to end his life, but there are several persuasive indica. When we connect the dots we are satisfied on the balance of probabilities that SGI was correct. The indica are as follows.
>
> [171] On the evening of December 29, 2019, the Deceased was at an increased risk of suicide because of relationship factors and alcohol consumption.
>
> [172] The Deceased's intentions are best determined by the last thoughts he communicated on this earth. It is not surprising that the communications are not completely consistent or coherent given his state of intoxication. However, the dominant tone is saying goodbye. The words must be interpreted in the context of his unexpected death minutes later.
>
> [173] The circumstances of the [motor vehicle collision] itself are the final factor. Although risk factors such as alcohol and environment are acknowledged, the entire circumstances are more consistent with a deliberate act. The Deceased accelerated directly into the Ford.
>
> [174] When we look at the totality of the evidence we see increased risk of suicide. We see messages of goodbye indicating the formation of an intention. We see execution of the intention with a highspeed direct hit to the Ford in front of his Girlfriend's house after a message to "watch" minutes before.
>
> [175] Considering the totality of the evidence we are satisfied on the balance of probabilities that the Deceased intended to end his life. The Commission upholds the SGI decision letter.

[90] Because I have determined that the factual errors alleged by Ms. Cosgrove do not constitute errors of law, I need not consider the factual errors alleged individually. I do note, however, that the Commission did not fail to analyze the sequence of events that occurred on the night of Mr. Cosgrove's death. On the contrary, the Commission found the evidence from all the witnesses to be "remarkably similar" (*Decision* at para 130). It also concluded that Dr. Richardson's opinion respecting whether Mr. Cosgrove's death was a suicide should be given no weight because, applying *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182, he had not cogently demonstrated the grounds for his opinion. The Commission noted twice (at paras 93 and 131) that it was arguable that Mr. Cosgrove had sped away from the R.M. office to avoid further conflict with Ms. Martin; it did not ignore that Ms. Cosgrove made that assertion. The Commission also acknowledged (at para 134) that while there was evidence to support Ms. Cosgrove's theory that the "goodbye" texts were consistent with Mr. Cosgrove's manipulative

character, there was also evidence to support SGI's theory that Mr. Cosgrove was at an increased risk for suicide, and was saying goodbye before committing suicide. Finally, the Commission found the evidence that Mr. Cosgrove had driven directly into another vehicle at a high speed and without attempting to brake to indicate, convincingly, that Mr. Cosgrove had intended to commit suicide.

[91] Ultimately, the Commission did *not* find Ms. Cosgrove's theory of events to be equally compelling to that of SGI. It was entitled to weigh the evidence as it did, and come to that conclusion. I am therefore not persuaded that the Commission erred in law in its consideration or treatment of the evidence.

4. Any error in taking judicial notice is of no consequence

[92] Ms. Cosgrove argues that the Commission erred by taking judicial notice of social views respecting suicide and policy reasons that might support discarding the presumption against suicide. As I have already found that the Commission erred by failing to apply the presumption against suicide, I need not address this ground of appeal further. I repeat, again, that the Commission's error respecting the presumption against suicide is of no legal consequence because SGI agreed that it bore the onus of proof on a balance of probabilities, and the Commission applied the correct persuasive burden to the evidence.

5. A court is not required to draw an adverse inference as a matter of law

[93] Finally, the Commission noted that "it might have been helpful" (at para 139) for expert opinion evidence to have been called respecting the effect of Mr. Cosgrove's past suicidal ideation on his risk of suicide at the time of the motor vehicle collision. In light of this comment, Ms. Cosgrove argues that the Commission should have drawn an adverse inference against SGI for failing to call such evidence. This argument cannot succeed. Even if it was possible for the Commission to have drawn the adverse inference that Ms. Cosgrove suggests it should have, the failure to do so does not give rise to an error of law.

[94] The adverse inference rule provides that a factual conclusion may be drawn against a party who fails to call a material witness without explanation, or fails to call a material witness over

whom they have exclusive control, and only if that evidence would have been superior to other, similar evidence: *Birnie v Birnie*, 2021 SKCA 107 at paras 34–35 [*Birnie*].

[95] As this Court explained in *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited*, 2023 SKCA 122 at para 12, the "adverse inference rule" is an evidentiary rule, which is discretionary. A court is not required as a matter of law to draw an adverse inference where a party fails to call a witness:

> [37] We can give no effect to this argument either. First, the "adverse inference rule" cited by UFCW, which arises from this Court's decision in *Murray v Saskatoon (City)*, [1952] 2 DLR 499 (Sask CA), is an evidentiary rule and not a legal test. There is no absolute requirement that a trier of fact draw an adverse inference where a witness who may have material evidence is not called; the decision whether to draw such an inference is discretionary…

[96] See also, *Birnie*, in which Leurer J.A. (as he then was) wrote that "[a] decision whether to draw an adverse inference involves an element of discretion" (at para 41); and, *Singh v Reddy*, 2019 BCCA 79 at para 9, 23 BCLR (6th) 22, in which Newbury J.A. emphasized that "it is now generally accepted that the court is not *required* as a matter of law to draw an adverse inference where a party fails to call a witness" (at para 9).

[97] It follows that the Commission did not err in law by not drawing an adverse inference in these circumstances. This ground of appeal must also be dismissed.

VI. CONCLUSION

[98] For these reasons, I would dismiss the appeal and order costs to SGI for the appeal, calculated in the usual manner. I would make no order for costs in respect of the application for leave to appeal given that Ms. Cosgrove correctly identified the Commission's error in failing to recognize the modern application of the presumption against suicide.

"McCreary J.A."

McCreary J.A.

I concur. "Tholl J.A."

Tholl J.A.

I concur. "Drennan J.A."

Drennan J.A.