# *Stout v. Track*: The Minority Mathematician

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In *Stout v. Track* (2015 ABCA 10), the Alberta Court of Appeal upheld the summary dismissal of Mr. Stout's claim by the court below. However, while the Court unanimously agreed the claim should be dismissed, the majority did not agree with the minority's mathematical approach. Justice Wakeling placed upper and lower percentage bounds for a claim's likelihood of success at trial in order to grant summary judgment.

In *Stout*, after Ms. Track ended her relationship with him, Mr. Stout called her over 500 times, sent her over 130 text messages, and left her over 15 voicemails in a three-month period. One night she was awoken by a sound and her security alarm went off. She locked herself in a bedroom and called the police. When she looked out the window, she saw Mr. Stout's vehicle drive away. Ms. Stout told the police she suspected Mr. Stout had tried to enter her house based on the numerous attempts he had made to contact her. Mr. Stout was arrested and released on terms forbidding him to contact Ms. Track, which he subsequently breached by following her. Mr. Stout was arrested again. Mr. Stout commenced an action for malicious prosecution. He alleged Ms. Track made false allegations to the police resulting in his arrest. Ms. Track made an application for summary dismissal of the claim, which the chamber's judge granted.

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On appeal, Justice Wakeling said the *Alberta Rules of Court* allowed summary dismissal of a claim if it has no merit (i.e. if the likelihood the opposing side's position will prevail is high). He said this required comparing the relative strengths of each party's position. However, he said the positions need not be so disparate that the plaintiff's prospects of success are close to zero before summary judgment may be granted.

On the other hand, "if the likelihood the moving party will prevail at trial is only fifty-one percent, the moving party will not be granted summary judgment… Other protocols are available…where the outcome is not obvious…summary trial may be the best protocol." While Justice Wakeling concurred with the majority that the claim should be summarily dismissed, the majority decided not to use his mathematical approach.

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Although the minority decision is not binding precedent, it does highlight a helpful exercise for litigants deciding to make summary judgment applications. Summary judgement will not be granted where the outcome at trial is not obvious. However, the quantification of "obvious" remains unresolved. The applicant need not demonstrate that their chances of success at trial are 100%, but meeting the civil standard on a balance of probabilities is likely not sufficient. It is promising to see judges trying to provide quantifiable certainty to legal tests. Subsequent decisions will bear watching if they refer to and apply Justice Wakeling's mathematical approach when assessing a claim's likelihood of success for the purpose of deciding a summary judgement or dismissal application.