



## The Whisper

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## “Every Move You Make, Every Step You Take, I’ll be Watching You”: Is Wearable Data Your Next Discovery Tool in Personal Injury Litigation?

by Elizabeth Sorenson Brotten



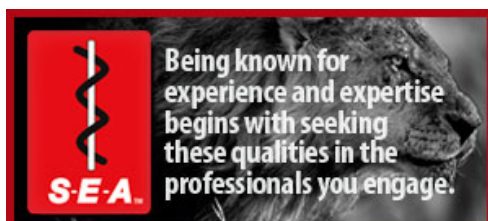
*“Every breath you take, every move you make, . . . every step you take . . . every claim you stake . . . I’ll be watching you.” –The Police, 1983*

Wearable fitness devices and trackers, commonly referred to as “wearables,” have exploded in popularity in recent years. Used by fitness fanatics and novices alike, measuring one’s activity level is now as simple as wearing a bracelet or a watch. (And, if you are like me, remembering to keep it charged.) While devices such as FitBit, Jawbone, Fuelband and Pivotal Living’s Life Tracker vary in their features and functionality, most include the ability to track personal statistics such as daily step count, activity level, and quality of sleep. Some devices also measure heart rate, perspiration levels, and changes in body temperature. As technology advances, wearable devices will become even more sophisticated, with features that will provide a virtual “black box” of the human body. Given the relevancy of the information wearables collect, wearable data could have a significant impact on your next personal injury case.

Current discovery tools to evaluate a plaintiff’s claim of personal injury, and the resulting impact on his or her physical activities, include testimony from the plaintiff and family members, written discovery, medical records, independent medical examinations, and surveillance. All of these methods have their weaknesses. Some involve significant costs, while others rely on self-reported and potentially biased information. The widespread and growing use of wearables now presents defense attorneys with an opportunity to gather a new source of data to assist in the evaluation of personal injury claims, directly from the plaintiff’s wearable device.

Personal injury attorneys at a Canadian law firm are already poised to use wearable data in attempt to support the claims of their client. Calgary law firm McLeod Law represents a plaintiff who claims that she was injured in an automobile accident. A former fitness instructor, she claims that her injuries have caused her activity level to drop significantly. Her attorneys produced her post-accident FitBit data as evidence that her physical activity levels have fallen. Because the accident occurred approximately four years ago, before the advent of FitBit, the plaintiff does not have any pre-accident FitBit data available for comparison. Instead, her data will be compared to baseline data for someone of her age and profession. This case is thought to be the first attempt to use wearable data in personal injury litigation and could open the door for more prevalent use of wearable data in personal injury cases. David Donovick, CEO and co-founder of Pivotal Living, agrees, anticipating that the use of wearable data in litigation will “absolutely” increase.

While this Canadian case illustrates how wearable data is being used to support a plaintiff’s case, wearable data could also be useful to an attorney defending a personal injury claim. Imagine deposing a fit-looking, young adult who claims that she is no longer able to train for marathons or compete in triathlons due to injuries she suffered in a car accident with your client. Based on your review of her medical records, you have some skepticism as to the severity of her injuries. When taking her deposition, you notice that she is using a wearable device. You seek the data from her wearable in discovery and it reveals that even after the accident, she manages to keep up with her pre-accident workout routine.



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The admissibility of wearable data may be subject to evidentiary challenges, including chain-of-custody, authenticity, accuracy, and reliability issues. Was the device actually worn by the plaintiff, as opposed to another individual? Does the device have a propensity to either underreport or overreport activity? Other concerns include whether the device offers opportunities for self-manipulation of data. For example, if data from a wearable device records less activity post-accident, is that evidence that the plaintiff has not been able to enjoy the same physical activities that he did before the accident? Or could it simply reflect that the plaintiff chose not to wear the device during post-accident activity? According to Donovan, the accuracy and reliability of wearable devices will improve over time and alleviate some of these concerns, as will their connectivity to other devices. "Someone may not have worn their band on their five mile run, but we will be able to use data from other devices, including that person's mobile phone and computer, to extrapolate whether that person really went on that run," says Donovan.

The mechanics of how the data will be introduced into evidence at trial could also create issues for the attorney seeking to admit wearable device data. In the Canadian case, instead of using the FitBit data directly, the plaintiff's attorneys provided several months of her post-accident FitBit data to Vivametrika, a company that analyzes data from wearable fitness devices. According to its website, Vivametrika provides "quantifiable data backed by clinical research to support legal cases involving personal injury and workers' compensation." It is anticipated that an expert from Vivametrika will testify on the plaintiff's behalf, opining as to how the FitBit data compares to baseline data gathered by the company.

The proponent of wearable data evidence at trial and related expert testimony must also satisfy the requirements of Rule 702 of the Federal Rules of Evidence and *Daubert*, or other state-specific admissibility standards. Under these standards, to be admissible, expert testimony must (1) "help the trier of fact to understand the evidence or to determine a fact in issue"; (2) be based on sufficient facts or data; (3) be based on reliable principles and methods; and (4) reliably apply the principles and methods to the facts of the case. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94, 113 S. Ct. 2786 (1993). To date, there are no reported decisions applying the *Daubert* test or its state-law counterparts to determine the admissibility of wearable data or related testimony. The first courts to address the issue will likely look to decisions analyzing the admissibility of data from similar devices, such as electronic data recorders (EDRs) in automobiles.

Ultimately, the Canadian case demonstrates the possibility that use of wearable data evidence will become prevalent in personal injury litigation. Given the ever-increasing popularity of wearables and the advancements in the features and reliability they offer, defense counsel are likely to see opportunities in litigation, both to introduce evidence of wearable data and to defend against the introduction of wearable data into evidence. Armed with knowledge of the jurisdiction's evidentiary standards, nuances among different wearable devices, and the opportunities and limitations wearable devices present, defense attorneys can put themselves in the best position possible to advocate as to the admissibility of wearable data evidence in personal injury claims.

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