

WATCH Your Step: New Innovations in Fitness Trackers Can Lead to Richer Data for Discovery in Personal Injury Lawsuits

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The rise in “wearable technology” has led many attorneys to innovate ways to bring data from fitness trackers into the courtroom. Wearable technology encompasses devices people wear that contain smart sensors and wirelessly connect to smartphones through a web or Bluetooth connection. Certain types of wearable technology can track a user’s activity and store the information for an unlimited amount of time. In civil and criminal litigation, fitness trackers and smart watches are emerging as a potential source of information that could provide valuable data for the prosecution or defense of a lawsuit. From the defense perspective, it is easy to see how fitness tracking data could help prove that a claimant has recovered from their injuries and maybe even prove fraud in the claims process. From a plaintiff perspective, it could help to prove inactivity related to injury.

In one of the more recent Apple Watch updates, an Apple Watch SE or Apple Watch Series 4 or later can detect a hard fall and connect the user to emergency services. Falls are automatically recorded in the Health App, unless the user replies that they did not fall when Apple Watch asks. This kind of data could be extremely useful in a slip and fall or trip and fall litigation.

Courts concur in the potential usefulness of fitness tracker information in personal injury lawsuits and have allowed the discovery of this data. At least one federal court has recognized that “a mobile app that indicates Plaintiff performs strenuous activities may be relevant to claims of injury or disability.” *Cory v. George Carden Int'l Circus, Inc.*, No. 4:13-CV-760, 2016 WL 3460781, at *2 (E.D. Tex. Feb. 5, 2016). In a recent decision in Missouri, *Batris v. Biomet, Inc.*, 2021 WL 2092785, No. 4:13-CV-00657-JAR (May 24, 2021), the trial court granted the defendant’s motion to compel discovery responses related to Fitbit data. In the personal injury lawsuit related to an allegedly defective hip implant, the defendants requested production of all data from the Fitbit and any other wearable device or other fitness tracker used by the plaintiff. The plaintiff cited general boilerplate discovery objections, argued that he was unable to obtain the information and that fitness tracker information is “potentially unreliable.” Citing broad discovery rules, the minimal burden of production and limited privacy risks, the court compelled production of a portion of the Fitbit data and found that it was not a fishing expedition. The extent of the plaintiff’s physical activity was relevant to claims of long-term physical injury. Furthermore, the plaintiff’s objection as to the potential accuracy of the data, went to its admissibility and weight, not its discoverability. “Like most discovery disputes, the discoverability of wearable device data depends upon the facts of the particular case.”

In Canada, two court opinions reference Fitbit data to support the conclusion that the petitioners were entitled to disability benefits. In both cases, Fitbit data was used to support claims of insomnia. Fitbits are fitness trackers that also track the quality of a user’s sleep when worn at night. Fitbits use a combination of a heart rate monitor and motion detectors to identify and measure different sleep stages: light sleep, deep sleep and REM. Fitbit advertises that its trackers can measure a user’s time spent in each sleep stage, as well as the user’s time awake. The information from Fitbit trackers provided a valuable alternative source to prove the petitioners’ claims.

Additionally, a personal injury law firm in Canada outfitted their client with a Fitbit tracker with the hope of proving the data will support their claim that their client’s activity was below average. When a personal trainer suffered injuries in an accident, fitness trackers were not widespread. Four years after the accident, the personal trainer’s lawyers outfitted her with a Fitbit Force to show the plaintiff’s current level of activity. The lawyers gave the data to Vivametric, an analytics company, and that data was compared with the activity of the general population, as determined by “industry and public research.” Vivametric takes a single person’s data, compares it to Fitbit’s databank of collected and stored data from other wearers and determines whether that person falls above or below the average.

This case law supports the obvious - that fitness trackers contain relevant data that can be useful in litigation and will provide a road map to its discovery. After discovery of the data, the next step is to lay the foundation for admissibility at trial. The foreseeable challenges to admissibility are most likely going to be the authentication and the accuracy of the data. There are several ways to authenticate the data, such as questioning the user, identifying data unique to the use of the device like references to a particular fitness goal, or hiring a computer forensic expert.

Proving the accuracy of the data will be a bigger problem. For example, Apple admits that its heart rate data is flawed. If anything is blocking the LED lights on the back of the watch which measure the heart rate, like tattoos or irregular skin perfusion, the heart rate reading will not be accurate. Similarly, Apple states on its website that water immersion while swimming could interfere with accurate heart rate data. Furthermore, irregular movements can confuse any device. Fitbit has also had the accuracy of its heart rate data questioned in a class action filed in 2016 currently pending in Northern District of California.

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In the suit, consumers from California, Colorado, and Wisconsin allege that the heart rate tracking in the Charge HR and the Surge, two products that came to market in 2015, is inaccurate by a "significant margin," especially during periods of intense exercise. Overcoming challenges to accuracy of the data will surely interfere with its admissibility, but it would still certainly be worth trying to admit overall trends in the data instead of an exact number of steps walked in a day or beats per minute of a person's heart.

Wearable technology is constantly evolving. It will be interesting to see what happens when the law catches up and whether this data will become a regular part of personal injury litigation, much like social media discovery.



Nanci Schanerman focuses her practice on civil litigation matters, including complex products liability, class actions, premises liability and general liability cases. She also represents tire manufacturers and handles litigation involving wrongful death and catastrophic injury.

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