



Who, what and wear

New generation of data-rich tech devices figure to soon have impact in courts

By KIM ARNOTT

WE'RE TRACKING OUR every move.

Forget the days of insurance companies attempting to catch out malingering claimants by hiring private investigators to lurk in parked cars with telephoto lenses. Nowadays, that surreptitious jog around the block — including the number of steps taken and maximum heart rate reached — is most likely to be recorded with an inexpensive fitness tracker worn on the claimant's wrist.

An explosion of computerized devices known as wearables has hit the marketplace in recent years. Affordable and popular, the digital devices let consumers capture — and often share — details of their habits, activities and biometric information with friends, and even strangers.

Technology is also being integrated into a range of workplace wearables. Sophisticated safety vests and hardhats monitor construction employees' vital signs, repetitive motions and proximity to heavy equipment, while some office companies are outfitting employees with lanyards capable of recording their interactions with other staff members.

With a slew of electronic devices gathering details about our lives, questions about the possible use of that data are intriguing many with an interest in personal injury law.

"I think the big impact for personal injury insurance litigation is that I am now my own private investigator, putting myself under surveillance," says Timothy Banks, a Toronto-based specialist in privacy and data security law with Dentons.

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Timothy Banks, Dentons Canada

The ways in which such surveillance might be used has yet to be determined. But its admissibility may initially be tested in a Calgary courtroom.

Earlier this year, personal injury lawyer Simon Muller of McLeod Law garnered widespread media attention when he let it be known that he is using personal trackers like Fitbits to gather data on the activity level of his clients. The devices, available in a variety of forms from a number of manufacturers, can track such things as the number of steps taken in a day, elevation changes and sleep patterns.

For example, activity data collected from a former personal trainer who was injured in a car accident four years is being run through an analytics platform offered by Calgary company Vivametrica. Muller expects it will show that she is now less active than other women of her age and profession.

He also has a client with a significant disability using the wearable device. If activity trackers can demonstrate someone's inability to maintain a healthy lifestyle, Muller notes that the data can be used to project their susceptibility to disease in the future.

“It gives us the ability to look beyond the immediate consequences of an injury and consider the long-term consequences,” he told *The Lawyers Weekly* earlier this year.

Being able to bolster client testimony with objective evidence from a fitness tracker could be very helpful in court, says Jason Katz, a personal injury lawyer with Toronto-based Singer Kwinter.

Individuals with well-established Fitbit histories could easily demonstrate their physical activity levels before and after an accident.

“One of the challenges we have on the plaintiff bar is trying to show the changes in people's quality of life by changes in their daily activities,” he said. “This is probably one of the most powerful and easiest ways to show the difference in a person's activity level.”

So far the admissibility of data collected from wearable devices hasn't yet been tested in a Canadian or American courtroom. But Matthew Pearn, a civil litigator in New Brunswick, notes that the broader issue of using digital data to analyze a

person's mobility status was recently considered in *Laushway v. Messervey* [2014] N.S.J. No. 107.

In that case, the Nova Scotia Court of Appeal upheld a lower court ruling compelling a plaintiff to turn over his computer hard drive to allow forensic analysis of its metadata. The information was to be used to evaluate his claim that an accident had limited his ability to sit and conduct his Internet-based business.

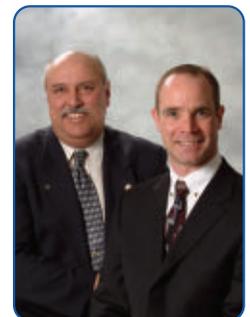
While the plaintiff complained that disclosure of the data would violate his privacy rights, the court found the data was both relevant and probative, and that the privacy interests of the plaintiff could be protected through the terms and conditions of the production order.

Patricia Mitchell, a partner with Stewart McKelvey in Hali-

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fax, represented the defendants in the case. She said that following the Court of Appeal decision, a settlement was reached in the case so the metadata was never collected.

“I don’t know if that court order had any impact on the desire to settle on the part of the plaintiff but I know it did resolve not long afterwards,” she said.

She believes the court’s decision was helpful in laying out a three-step method of analysis for considering requests for electronic data.

“The real analysis —as with any piece of evidence that a party wants to admit in a case — is whether it’s relevant to the issues between the parties.”

“It makes a lot of sense to me that data from wearable devices may very well be relevant in the personal injury context.”

The courts may also very well make that determination, says Banks.

“Just because it comes from a wearable and just because it may be sitting in the cloud doesn’t mean it isn’t subject to the ordinary rules of production and evidence as other data in a lawsuit,” he said.

While courts will have to evaluate the sensitivity of the information being collected and its relevance in the case at hand, he predicts there will be an initial flurry of cases in personal injury and employee litigation that will see wearable data requested.

“I think we’ll see the same type of pattern as we did with social media — the court initially giving the benefit of the doubt to its relevance and then later being a bit more circumspect as to when the data is relevant and needs to be produced,” said Banks.

As courts grapple with how to wisely use the increasingly pervasive technologies, Pearn suggests one of the biggest challenges for lawyers will be to provide judges with satisfactory explanations of the technology and some comfort that the information they generate is probative.

“It’s a new kind of tool in the litigation tool kit and I think the courts will really struggle with whether this is too deep an invasion into someone’s private life,” he said.

Even privacy regulators have been struggling to manage the implications of rapidly developing technologies, said Banks. In an attempt to protect individuals from “unanticipated bad outcomes” related to their electronic data, he says most Canadian and European privacy regulators have been employing the precautionary principle when dealing with new technology.

Canada’s privacy law landscape is also evolving, says Karen Eltis, a law professor at the University of Ottawa and author of *Courts, Litigants and the Digital Age*.

While Canadian courts have been fairly open to admitting digital data as a new form of evidence, she believes a recent evolution toward “a far more robust” interpretation of privacy

rights may have a significant impact on electronic evidence.

In particular, she points to the 2014 Supreme Court decision in *R. v. Spencer* [2014] S.C.J. No. 43, which considered digital privacy implications in the criminal law context and found that police required a warrant to obtain IP subscriber data.

“If courts are recognizing that IP subscriber data is intimate information, that it’s not like a phone book ... well, Fitbit seems intuitively more intimate,” she says.

Even when courts do admit data arising from new technology, she warns against the dangerous tendency to imbue it with an “illusion of infallibility.”

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Matthew Pearn, Lawyer

Pointing to early DNA evidence that resulted in wrongful convictions and GPS devices that led drivers miles out of their way, Eltis says data from new technology needs to be questioned, authenticated and understood in context.

“These things can be really misleading if de-contextualized,” she says.

Data from wearables may also become less reliable over time if people become aware of its discoverability and begin to distort or manipulate the data as a result, she adds.

“At the time being, the mystique and the novelty is what these things have going for them in terms of evidence, but as that erodes we’ll have to perhaps revisit the value of the use of such devices in court.”

Katz agrees that small samples of the digital data from wearable devices could be misleading, just as a Facebook photo of a party or vacation can be misinterpreted. And while it may have value for plaintiffs in some circumstances, it may also work against them in other cases.

“Like everything, it’s just one other potentially complicating factor that lawyers will have to look at in the basket of evidence that they have to try and piece out the strengths and weaknesses of their case and how to present it.”

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