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Tennis Star Eugenie Bouchard Sues Operators of the U.S. Open for Accident that Resulted in Head Injury

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The majority of media coverage and litigation involving sports and concussions in recent years has largely centered on bone crushing contact sports. Earlier this year, a federal judge approved a massive settlement in a class action suit commenced on behalf of thousands of former NFL players relating to concussions. Years earlier, in 2007, Harvard graduate and former professional wrestler Chris Nowitski, who had previously been diagnosed with post-concussion syndrome based on head trauma sustained during his years in the squared circle, co-founded the Sports Legacy Institute ("SLI"), a non-profit organization dedicated to solving the crisis of concussions in sports. The majority of SLI's work has focused on sports like football and boxing. Now, a new lawsuit has brought an unlikely sport into the mix: tennis.

Eugenie "Genie" Bouchard, a prominent women's tennis player, recently commenced a personal injury action in the United States District Court, Eastern District of New York against United States Tennis Association, Inc. ("USTA"), which operates the U.S. Open. The suit stems from a slip-and-fall accident that occurred on September 4, 2015, which allegedly caused Ms. Bouchard to sustain a head injury. Ms. Bouchard, who had just won a mixed-doubles match at the 2015 U.S. Open in Flushing Meadows-Corona Park in Flushing, New York, claims to have fallen as a result of a "slippery, foreign and dangerous substance" on the floor of the physiotherapy room of the women's locker room. She struck her head and sustained a concussion. USTA

National Tennis Center, Inc. ("Tennis Center"), which operates the site of the U.S. Open, was also named as a defendant.

Ms. Bouchard, 21, became the first Canadian to reach the finals of a Grand Slam in women's singles competition at the 2014 Wimbledon Championships. She was named the Women's Tennis Association's Most Improved Player in 2014. At one point during that year, she was also ranked as the fifth ranked women's player in the world. At the time of her accident, Ms. Bouchard was ranked number thirty-nine.

She defeated Dominika Cibulkova in a third-round singles match on the morning of her accident. Later that evening, she and partner Nick Kyrgios defeated Elina Svitolina and Artem Sitak to advance to the second round of the mixed doubles bracket. After winning the doubles match, which ended at approximately 10:00 p.m., Ms. Bouchard was walking through the physiotherapy room of the women's locker room when she slipped and fell. As a result of her head injury, Ms. Bouchard was forced to withdraw from contention for the championships in the women's singles, women's doubles and mixed doubles brackets, and was the only player still in contention in all three brackets at the time of her withdrawal.

Since her accident, Ms. Bouchard has withdrawn from numerous tournaments. The budding tennis star attempted to return to the sport in a match at the China Open on October 5, 2015 against Andrea Petkovic. However, she was unable to finish the match as she was complaining of dizziness. She has not returned to tennis since and has dropped to number forty-eight in the latest women's tennis rankings, released on October 26, 2015.

Ms. Bouchard has earned nearly \$4.5 million in career prize money, which does not include earnings from endorsements with major companies like Nike, Rolex and Diet Coke. She earned over \$780,000 in prize money in 2015 prior to her accident. In late 2014, she signed a representation deal with major talent agency WME/IMG and was assigned agents that have worked with sports crossover stars such as Dwayne "The Rock" Johnson, Serena Williams and Ronda Rousey.

Ms. Bouchard now seeks an unspecified amount of damages for "economic loss, medical expenses and loss of enjoyment life" resulting from her head injury. Through her attorneys, the Morelli Ratner Law Firm, PLLC, Ms. Bouchard asserts causes of action for negligence against both the USTA and the Tennis Center. She alleges that they were collectively negligent in "fail[ing] to maintain, clean and repair the women's locker room and physiotherapy room in a reasonably safe and suitable condition" and that they "had actual and/or constructive prior notice of the dangerous condition" which alleged caused her to fall.

Although Ms. Bouchard is a Canadian citizen, the laws of New York will apply to her negligence claims, based on the fact that New York was the situs of her accident and both defendants are domiciled in the state. See *Aviles v. Port Auth.*, 202 A.D.2d 45, 615 N.Y.S.2d 668 (1st Dep't 1994). In order to prevail on a theory of common law negligence under New York law, a plaintiff bears the initial burden of proving that: (1) a defendant had a duty to conform to a certain standard of conduct; (2) the defendant breached that duty; (3) such breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage. See *Huth v. Allied Maintenance Corp.*, 143 A.D.2d 634, 532 N.Y.S.2d 880 (2d Dept. 1988). With regard to liability for a dangerous condition, as a matter of logic plaintiff must first prove that the condition alleged existed. See *Hoffman v Mucci*, 124 A.D.3d 723, 2015 N.Y. App. Div. LEXIS 507 (2d Dept' 2015). Furthermore, "[t]o establish a prima facie case of negligence in a slip-and-fall case, a plaintiff must show that the defendant either created the condition which caused the accident, or that it had actual or constructive notice of the condition." *Panetta v. Phoenix Beverages., Inc.*, 29 A.D.3d 659, 816 N.Y.S.2d 122 (2d Dep't 2006).

As Ms. Bouchard's accident occurred in a U.S. Open locker room, one or both of the defendants will likely be deemed to have been responsible for properly maintaining the premises. However, it is often difficult for a plaintiff in a slip-and-fall case to establish the notice required to impose liability. The question of notice could hinge on whether an agent of the defendants, such as a custodian, created the alleged slippery condition by, for example, cleaning the floor and leaving it wet at a time when it could reasonably be anticipated that athletes such as Ms. Bouchard would be entering the area. However, absent a surveillance video or a very forthcoming witness, such evidence is often difficult to come by. If the defendants or their agents did not create the condition at issue, actual notice could be established through evidence indicating that the defendants were aware of the dangerous condition yet failed to remedy it. Alternatively, Ms. Bouchard may establish that the defendants are liable on a theory of constructive notice, which requires a showing that a defendant reasonably should have been aware of a condition, had ample time to remedy it and failed to do so.

In the event that Ms. Bouchard is able to establish that the defendants were negligent, or a reasonably likelihood of same that could place her in an advantageous settlement position, her damages will in large part depend on the severity of her head injury. As she attempted to return to the sport a mere thirty-one days after her accident, it would appear as though she is making a relatively good recovery. However, the fact that she could not complete her return match due to dizziness indicates that she is still suffering from some lingering effects, and it is

therefore likely too early to state with any certain the severity of her injury or how long its symptoms may last. Although damages for pain and suffering, or loss of enjoyment of life, are often difficult to quantify, Ms. Bouchard's attorneys will likely seek to establish entitlement to any economic damages reasonably related to her injuries, including loss of direct tennis earnings and any potential sponsorship losses related to her inability to play. Certain amounts will likely be difficult to establish, such as the full extent of her potential prize earnings, as there will be no way to state with any certainty how Ms. Bouchard would have fared in a particular tournament but for her injuries.

It would not be surprising if Ms. Bouchard's attorneys sought the assistance of an expert economist to quantify the extent of her economic damages, as such damages could turn out to be substantial in light of the tennis star's substantial earnings. An expert concussion specialist, likely a neurosurgeon or neuropsychologist, could help establish the extent of her injuries and the potential likelihood of permanent symptoms.

Depending on the way that the discovery process transpires in the suit, the defendants may follow a motion for summary judgment on the issue of liability, at which point Ms. Bouchard's claims could receive a backhand from a Federal Court judge.

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