



# The Gavel

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## Gibson & Behman Obtains Defense Verdict in a Rear-End Collision

Attorneys Scott R. Behman and Sharmili P. Das recently obtained a defense verdict in a case involving a public transportation bus that rear-ended the Plaintiff's vehicle.

The Plaintiff alleged in his complaint that on January 15, 2000, while he was at the intersection of Massachusetts Avenue and Highland Avenue in Arlington, Massachusetts, he was rear-ended by a bus. From the onset of

the case Gibson & Behman denied that the operator of the bus was negligent as the bus skidded on black ice. Under Massachusetts law mere skidding is not evidence of negligence. Moreover, there was no evidence that the operator of the bus was following too closely or speeding at the time of the accident. Further, there was overwhelming evidence that the operator of the bus complied with the rules of the road and maneu-

vered the bus reasonably at all times.

Immediately after the incident the Plaintiff sustained some soft tissue injuries which resolved in March of 2000. However, approximately three years later the Plaintiff underwent an MRI which revealed that the Plaintiff had a herniated disc at L4-L5 resulting in a discectomy. The Plaintiff alleged that his herniation and all other problems

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## Gibson & Behman Secures Defense Verdict in Negligent Security Case

During the late Sunday evening hours of a long holiday weekend in November 2002, the Plaintiff and his companion were assaulted by unnamed assailants as they exited the Porthole Restaurant & Pub in Lynn, Massachusetts. The Plaintiff alleged that the Porthole was negligent for failing to provide ade-

quate security in the form of security staff at the door and in the parking lot at closing time. As a result of the assault, the Plaintiff suffered a fractured jaw requiring surgery, as well as an alleged exacerbation of his underlying psychosis (schizoaffective disorder). Because of the Plaintiff's underlying mental illness,

despite the fact that he was an adult (23 years old at the time), his parents brought claims against the Porthole for loss of consortium.

The Plaintiff retained a security consultant who testified at trial that the Porthole's security policies and procedures were

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# New Hampshire

## New Hampshire Upholds Rule Against Tort Liability for Criminal Acts of Others

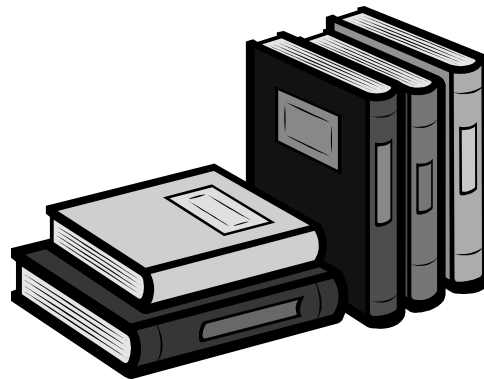
There exists in most jurisdictions the general rule that individuals are not subject to tort liability arising from the criminal acts of others. New Hampshire adopts the general rule and historically allows for only four exceptions: (1) when there is a special relationship; (2) where the defendant creates an especial temptation and opportunity for the criminal misconduct; (3) the existence of overriding foreseeability; and (4) when one voluntarily assumes the duty to prevent the criminal act. This rule recently withstood a challenge pursuant to a split New Hampshire Supreme Court opinion under controversial circumstances.

The recently decided case involved a challenge to the general rule against tort liability for criminal attacks of others. These claims often arise in negligent security cases against landlords, security personnel or premises operators. In this instance, two children had filed several claims against their church elders for failing to prevent sexual abuse by their father and stepfather. Their mother had reported the ongoing sexual abuse to church elders who then met with the parents to counsel them on several occasions. The elders failed to report the child abuse under the reporting statute, RSA 169-C:29, and even directed the wife to “be silent about the abuse and be a good wife.” The

trial court dismissed the claims because it construed the reporting statute narrowly as not specifically requiring that church elders report child abuse and found no exception to the general rule against tort liability in New Hampshire.

On appeal, the New Hampshire Supreme Court in the recent case of *Berry v. Watchtower Bible and Tract Society* affirmed the trial court and upheld the general rule that individuals are not liable in tort for the criminal acts of others. The Court was concerned that it not create a “slippery slope where friends and relatives will face tort liability for giving bad advise.” The majority opinion was harshly criticized in the dissent that argued in favor of liability because the church elders had reason to anticipate the criminal conduct and created a situation that facilitated it by advising the mother to remain silent. The result is even more noteworthy in light of the current controversy regarding the various nationwide church abuse scandals.

After *Berry*, it appears that the law in New Hampshire will continue to favor a general rule against tort liability for the criminal acts of others, even under very difficult circumstances. In order to overcome the bar against liability, claimants will need to show overriding evidence that a duty to prevent or report the criminal activity clearly existed under all the circumstances in order to support tort liability. Should you have any further questions, please feel free to contact Kevin O’Neill, Esquire of our New Hampshire office at (603) 624-5548.



# M a i n e

## When is a Maine Motorist “Underinsured”?

Maine defines an underinsured motor vehicle as “a motor vehicle for which coverage is provided, but in amounts less than the minimum limits for bodily injury liability insurance provided for under the motorist’s financial responsibility laws of this State or less than the limits of the injured party’s uninsured vehicle coverage.” 24-A.M.R.S.A. § 2902(1).

However, while the above inquiry is to be made when dealing with a one victim accident, is the same inquiry to be made when dealing with a multiple victim accident? This is the inquiry recently raised in *Budd v. GEICO General Ins. Co.* 2006 WL 521775 (Me.Super. January 17, 2006)

In *Budd* the Plaintiff, Michael Budd, and his wife, Melanie Budd, were injured in a two-car automobile accident in Dover, New Hampshire. The other car involved in the accident was a taxicab owned by Sunshine Taxi Company. At the time of the accident, Sunshine maintained a contract for insurance with AIG Insurance Company (“AIG”). The AIG policy provided single limit liability coverage in the amount of \$350,000 per accident. On the date of the accident, Plaintiff was insured by GEICO. His GEICO policy contained uninsured/underinsured motorist coverage in the amount of \$100,000 per person and \$300,000 per accident.

On November 11, 2004, Michael Budd and his wife settled claims with Sunshine and AIG for \$350,000, Michael accepted \$5,000 as compensation for his loss of consortium claim, and his wife received \$345,000 for her injuries.

Michael Budd then attempted to recover uninsured motorist coverage benefits from GEICO. GEICO denied said request on the basis that the tortfeasor, Sunshine Taxi Cab, is not “underinsured,” as the available coverage for Sunshine’s vehicle, at \$350,000 per accident, exceeds the Plaintiff’s underinsured limit of \$300,000 per accident. While this is clearly the test for underinsurance under § 2902(1); Plaintiff argued that 24-A M.R.S.A. § 2902(6) applies and that therefore, the test of whether Sunshine Taxi was underinsured requires a comparison between Plaintiff’s potential personal recovery under his uninsured / underinsured motorist policy and Plaintiff’s recovery for personal injuries from Sunshine / AIG.

GEICO responded that § 2902(6) cannot be applied because the first phrase of this subsection, known as the “trigger clause,” requires the tortfeasor to first have been defined as “underinsured” pursuant to § 2902(1). The Court disagreed with this position on the basis that this interpretation would effectively void the applicability of § 2902(6)

in any circumstance. The Court refused to do this since the section was plainly applicable to any situation in which there are multiple accident victims, as there were in this case. The Court cited to the legislative history of § 2902(6) (“in certain cases where more than one person is injured in an accident ... [every] person is covered to the full extent of the underinsured motorist coverage purchased.” L.D.2043, Summary (119<sup>th</sup> Legis.1999).) as support for its decision.

Hence, the Court held that § 2902(6)’s test for underinsurance controlled Plaintiff’s right to recovery. Therefore, since Plaintiff’s personal recovery limit under his underinsured motorist policy was \$100,000, which is more than the amount Plaintiff received from Sunshine’s bodily injury liability policy. Plaintiff was allowed to demonstrate that his damages exceeded any amount received for personal injuries from Sunshine / AIG, for purposes of collecting from GEICO under his own uninsured / underinsured motorist policy.

Therefore, in determining which test to employ to see if a tortfeasor was underinsured, the requisite inquiry is whether the tortfeasor was the only victim or whether there were additional victims.

# New York

## Utilizing the Routine Maintenance Exception to Avoid the Absolute Liability Imposed by New York Labor Law §240

Owners and contractors generally are absolutely liable under Labor Law § 240 (1). However, the “routine maintenance” exception set forth by the statute, and assessed below, may be aggressively utilized to protect an owner/contractor when liability would normally be imposed.

Historically, Labor Law § 240 (1) was enacted to compel owners and contractors to comply with all safety standards on a work site related to elevation related risks. The failure to do so would expose them to absolute liability. More pointedly, the application of the statute by plaintiff’s in personal injury actions has consistently resulted in the imposition of liability on owners and contractors, even when they did comply with the rules.

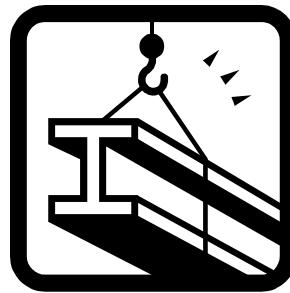
Clearly, the original purpose of this statute was to promote responsibility among those engaged in the business of construction and repair, and to owners of buildings.

NY Labor Law § 240 (1) in pertinent part reads as follows:

Scaffolding and other devices for use of employees

1. All contractors and owners and their agents, except owners of one and two-family

dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be



furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. (McKinney’s 2006)

In the Statute’s application, the New York Courts hold that a violation of N.Y. Labor Law § 240(1) creates absolute liability and the failure to provide any safety devices is such a violation; however, causation must also be established, and the plaintiff is obligated to show that the violation of § 240(1) was a contributing cause of his fall. *Blake v. Neighborhood House. Servs. of*

*N.Y. City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 (2003).

Moreover, New York Courts have consistently held that a plaintiff who is involved in *routine maintenance* is not protected by Labor Law § 240(1). This is an important exception to Labor Law § 240 (1) and must be fully explored by attorneys in defending such actions.

Some examples of routine maintenance cases involve an injury while adjusting a loose chain on a garage door. The court held that plaintiff was engaged in routine maintenance and not ‘repairing’ within the meaning of Labor Law § 240(1).

The distinction between routine maintenance and repairing does not turn solely on whether the work involves fixing something that is not functioning properly. Even if the item to be repaired is malfunctioning or inoperable, when the work involves only component replacement or adjustment necessitated by normal wear and tear, it constitutes routine maintenance, rather than ‘repairing’ or any other enumerated activity. *Barbarito v. County of Tompkins*, 22 A.D.3d 937, 803 N.Y.S.2d 208 (3d Dep’t 2005).

(Continued on page 5)

# New York

## Utilizing the Routine Maintenance Exception to Avoid the Absolute Liability Imposed by New York Labor Law §240, continued

(Continued from page 4)

As a result, attorneys defending such claims must fully evaluate the facts of each case to determine whether the injured person was engaged in the type of work protected by the statute. The New York cases below define the difference between work covered by the Statute and work that takes a potential claimant outside of the protection of the statute.

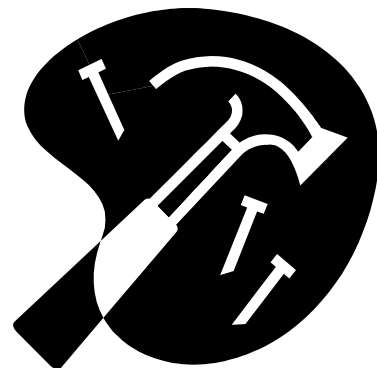
The amount of work or danger entailed, however, does not bring a case within the confines of the term "repair" for purposes of determining liability under Labor Law § 240 (1). Nor is it dispositive that the job arose from a service call by defendants requesting, among other things, repair of an operator on another door that had been damaged by a truck, in addition to the adjustment of the chain. The fact that a job rises from a service call, rather than regularly scheduled maintenance, is not sufficient to render it repair work. Moreover, while plaintiff's work on the other door's damaged operator may have constituted "repairing" that job was completed prior to plaintiff commencing adjustment of the loose chain and "the statute does not cover an injury occurring after an enumerated activity is complete." *Barbarito v. County of Tompkins*, 22 A.D.3d 937, 803 N.Y.S.2d 208 (3d Dep't 2005).

The question of whether an activity is routine maintenance and not covered by Labor Law § 240(1) as distinguished from a repair or alteration covered by Labor Law § 240(1) is a question of degree which must be considered in light of the legislative purpose to protect against risks related to elevation differentials. Standing on a step ladder to perform the periodic replacement of a plastic sign in a sign holder constitutes routine maintenance. See *Cook v. Parish Land Co.*, 85 N.Y.2d 1000, 630 N.Y.S.2d 962 (1995). However, replacement of a defective light fixture on a light pole 25 to 27 feet high constitutes a repair or alteration since the work involves more than routine maintenance. See *Cook v. Presbyterian Homes of W.N.Y.*, 234 A.D.2d 906, 655 N.Y.S.2d 4<sup>th</sup> Dep't 1996).

In another case, a telephone repairman was injured in a fall from a ladder while investigating a nonworking telephone line. The Court found that the repairman was not protected by Labor Law § 240(1), where he was performing routine maintenance at time of the accident, not "erection, demolition, repairing, altering, painting, cleaning or pointing of a building" under § 240(1). See *Breeden v. Sunset Indus. Park Assocs.*, 275 App.Div.2d 726, 713 N.Y.S.2d 210 (2<sup>nd</sup> Dep't 2000).

In *Sanacore v. Solla*, 284 App.Div.2d 321, 725 N.Y.S.2d 383 (2<sup>nd</sup> Dep't 2001) plaintiff, who fell from a ladder while replacing broken fluorescent light ballast was hit on head by a falling object. The court held that plaintiff was merely involved in routine maintenance, and thus the court improperly denied defendants' summary judgment motion in an action under Labor Law § 240(1).

Based on these and other New York holdings, defense attorneys must carefully assess the facts and, when possible, aggressively utilize this exception. The routine maintenance exception to the absolute liability imposed by Labor Law § 240(1) can be an exceptional tool in defending a Labor Law case and must always be considered in defending these claims.



# C o n n e c t i c u t

## Federal Law Ends Vicarious Liability for Rental Car Companies in Connecticut, Nationally

Connecticut law holds owners of motor vehicles equally responsible for the negligent acts of authorized drivers of their vehicles. This rule applied to car rental companies as well. Connecticut General Statutes § 14-154a, titled "liability of owner for damage caused by rented or leased motor vehicle," states that:

[a]ny person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased, to the same extent as the operator would have been liable if had also been the owner. C.G.S. § 14-154a(a).

However, on August 10, 2005, a new federal law abolishing vicarious liability for rental and leasing companies was enacted. The "rented or leased motor vehicle and

safety responsibility" act, 49 U.S.C. § 30106, states in relevant part that:

[a]n owner of a motor vehicle that rents or leases the vehicle to a person ... shall not be liable under the law of any State ... by reason of being the owner of the vehicle ..., for harm to persons or property that



results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if --

(1) the owner...engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoings on the part of the owner ....

49 U.S.C. § 30106(a).

In March 2006, a Connecticut rental company, We Rent Minivans, became one of the first three beneficiaries of the new federal law. In *Nicola Davis v. Milagros Ilama*, Waterbury Superior Court Judge Robert C. Brunetti interpreted 49 U.S.C. § 30106 to bar vicarious liability claims against rental companies in Connecticut. Judge Brunetti agreed with a Queens County, New York court and a Maine federal court that the act's August 10, 2005, effective date prohibits any vicarious liability claim commenced after that date, regardless of when the accident happened.

### New Additions to the Firm

Gibson & Behman, P.C. is pleased to announce that the following associates have joined the firm:

**Bella Pevzner, Esq.**, New York office

**Jordan Rattray, Esq.**, Burlington office

**Heather Merrill**, Burlington and New Hampshire offices

They are great additions to the firm and we are extremely pleased to have them on board.

# R h o d e I s l a n d

## Gibson & Behman Victorious in Rhode Island Workers' Compensation Court

### Facts/Procedural History:

This case came before the Rhode Island Workers' Compensation Court on the Employee's Original Petition for Workers' Compensation benefits. The Employee claims he was injured, and became disabled, while in the employ of Gessman Construction, Inc. (hereinafter referred to as Gessman). The Employee was employed by Gessman as a laborer. On or about November 12, 2005, the Employee claims he was moving plywood in the course of his employment with Gessman and that while moving this product he strained his lower back.

The Employee had reported this injury to his supervisor immediately after the incident and received medical treatment at Rhode Island Hospital the same day.

Gibson & Behman, through discovery obtained, the Employee's complete medical history and discovered that the Plaintiff had suffered from numerous injuries in the past including injury to his back and his right shoulder. This right shoulder injury was not work related and in fact occurred while the Plaintiff was playing softball. It was also discovered that the Employee had rotator cuff surgery scheduled for November 19, 2005, one week after this alleged work related accident.

The Plaintiff treated at Rhode Island Hospital as well as Orthopedic As-

sociates and Kenneth Morrissey, M.D. The medical history given by the Employee, at each of these medical facilities, was inconsistent regarding how the Employee was injured.

Gibson & Behman obtained an independent medical examination from Stanley Stutz, M.D. Dr. Stutz opined that after reading the Employee's medical records and examining the Employee it was unclear how the Employee's injury occurred and that he saw no medical evidence that the Employee could not return to his regular employment.

### Analysis of the Law:

There is a two prong test to determine if an Employee is entitled to workers' compensation benefits: the Employee must prove that 1) the injury arose out of and in the course of employment with the employer; and 2) that a disability has been caused by the alleged injury. R.I.G.L. Section 28-33-1; R.I.G.L. Section 28-33-4.

Gibson & Behman argued in this case that the Employee has failed to meet his burden because his medical records were inconsistent regarding how he sustained injury and the records also did not state within a reasonable degree of medical certainty that the Employee's injury created a disability that prevented the Employee from fulfilling his

occupational duties.

The Employee testified that he was injured while lifting and moving plywood and that he had reported it to his boss immediately and also sought medical attention that day. The Employee further claimed that his back was still bothering him and that he was still unable to fulfill his job as a laborer.

### Decision:

The Rhode Island Workers' Compensation Court held that the Employee had not carried his burden to prove that his injury arose out of and in the course of employment with the employer because there was too much inconsistent evidence to the contrary. Furthermore, the Court agreed with the findings and opinions of the independent medical examiner, Dr. Stutz, that the Employee had not sustained an injury which caused him to be disabled from his job as a laborer with Gessman. Therefore, the Court found for Gessman and denied the Employee's petition for benefits.



# C a l i f o r n i a

## California Enforces Forum Selection Clause To All Actions Related To An Employment Agreement

The California Court of Appeals, Second Appellate District recently upheld the trial courts decision to uphold a forum selection clause in an employment agreement, despite California's public policy interest in deciding its own discrimination laws. In the case of *Olinick v. BMG Entertainment, Inc.* (2006 Cal. App. LEXIS 588), the issue presented to the court was whether the Plaintiff's statutory age discrimination claims were subject to the forum selection clause in the employment agreement between the parties.

The Plaintiff, Martin Olinick (Olinick) was employed by the music company BMG Music (BMG) as an attorney pursuant to an employment agreement. Paragraph G of the employment agreement provided that the "Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York, without regard to conflict of laws." Olinick subsequently was transferred to California where he continued to be employed by BMG for a number of years, until his employment was terminated. The agreement included a clause allowing Olinick to be terminated without cause.

After he was terminated, Olinick brought an action against his former employer claiming age discrimination based on federal and state anti-discrimination statutes. BMG moved to have the action dismissed based on the forum selection clause of the employment agreement argu-

ing California was the incorrect forum. BMG asserted that the provision applied to all causes of action that arose out of the employment agreement and thus the case should be dismissed. Olinick defended the motion by arguing that the present causes of action were based upon California statutory principals and did not arise out of the employment agreement.

The Court began its review of the issues by determining that the forum selection clause did apply to Olinick's statutory claims. Extensively citing and discussing *Nedloyd Lines B.V. v. Superior Court (1992)*, the Court stated that in the application of a chosen forum that the forum shall apply to all causes of action arising from or related to the contract. While Olinick argued that the contract was not related to the discrimination claims, BMG contends that it would have to defend against the action by asserting its contractual right to terminate Olinick without cause which brings the contract into the action. The Court agreed with BMG stating that the choice of forum clause applies to all causes of action related to the agreement regardless of how they are characterized.

The causes of action asserted in this action were not predicated on the existence of the employment agreement and can be brought by any employee, even if they are not employed pursuant to a contract. However, since the parties to this action were parties to an agreement

governing their employment relationship, the employment agreement was effective. The court rejected Olinick's argument that California had a vested interest in protecting its residents from discrimination. The Court reasoned that the discrimination statute did not contain an antiwaiver clause forbidding the action be transferred out of the jurisdiction of California. Secondly, the forum the action was to be moved to did provide a remedy for the injury asserted.

The parties had negotiated and entered into a binding employment agreement. The employment agreement was therefore enforceable against all causes of action which arose out of, or was related to the employment agreement. Despite the public policy nature of discriminatory causes of action a binding employment agreement is controlling between the parties to the agreement. The Court's extension of all cases of action related to in addition to all actions arising out of an employment agreement extends the binding force of an agreement to that which the parties may not have intended. It has become more and more necessary for the parties to an agreement to clearly articulate all actions covered as well as all actions not covered by an agreement. Employees and employers alike must review their agreements and modify them regularly to assure they are relevant to the current location and position of the parties.

# Florida & U.S. Virgin Islands

## Florida "Purifies" Comparative Fault Law

On April 26, 2006, Governor Jeb Bush signed into law Florida Bill No. 145 that overhauls and greatly simplifies comparative fault law in Florida. Essentially, the new law deletes the prior provisions that had limited the extent of pure comparative negligence principles in allocating damages and applied joint and several liability under certain circumstances. For example, the prior law indicated that a defendant found to be up to 25% at fault could be held jointly and severally liable for a plaintiff's economic losses up to 200,000, and jointly and severally liable for such damages up to \$1,000,000 if the defendant's fault was determined to be more

than 50% at fault. Under the new law which applies to all negligence related causes of action that accrue on or after the above effective date, judgment is entered purely against each defendant based solely upon such party's percentage of fault and not on the basis of the doctrine of joint and several liability. As such, Florida has essentially abolished all remaining aspects of joint and several liability regardless of the degree of fault in negligence cases under the statute. Importantly, the new law maintains the prior rule that the fault of nonparties may also be included on the verdict form when properly identified or described during the litigation. Gibson & Behman has effectively

utilized this provision to include nonparties, such as unidentified "phantom vehicle" operators, landlords and other service providers, on the verdict form for a jury to allocate fault to such non represented parties in order to reduce the percentage of fault allocated to our named defendant.

The new law is a victory for defendants who will no longer be held liable in Florida for damages in excess of their percentage of fault for a negligence type claim. Should you have any further questions, please feel free to contact Christopher P. Cifra, Esquire of our Miami office at (305) 347-5147.

## Gibson & Behman Wins Significant Discovery Motion in St. Thomas

This case arises from a slip and fall incident that occurred on June 17, 2002 at the Defendant's parking lot in St. Thomas. Due to the incident the Plaintiff alleges multiple soft tissues injuries. The Defendant is a media corporation with several affiliates and subsidiaries. The Plaintiff, unsure which entity controlled and maintained the parking lot sued three entities which were affiliated with or a subsidiary of the same media corporation. Despite the fact that the Defendant adequately responded to discovery and disclosed the relationship of the subsidiary companies with each

other and the parking lot, the Plaintiff served a subpoena to the Commissioner of Licensing and Consumer Affairs requesting all records regarding the three entities named in the lawsuit. Plaintiff's counsel not pleased with the Defendant's discovery responses attempted to go on a fishing expedition.

After receiving copies of the subpoenas the Defendant filed a Motion to Quash. The Defendant argued first and foremost, the Local Rule of St. Thomas only allows a clerk or a judge to issue a subpoena. Moreover, the subpoena failed to comply with the Federal

discovery rules and Local Rules governing subpoenas provisions. Lastly, the information sought by the Plaintiff was completely irrelevant to the case at hand.

The Court allowed the Defendant's Motion to Quash. Further, the Court specifically placed Plaintiff's counsel on notice that any future violation of the rules of civil procedure regarding the issuance of subpoena will be severely sanctioned. Gibson & Behman continues to aggressively defend this matter and will take the appropriate steps to obtain a successful resolution of the case.

# M a s s a c h u s e t t s

## Gibson & Behman Obtains Defense Verdict in a Rear-End Collision, continued

*(Continued from page 1)*

related to the disc were caused by the incident of January 15, 2000. The Plaintiff attempted to increase the value of the case by claiming that the herniated disc and subsequent surgery were related to the rear-end accident. At all times, Gibson & Behman argued that the Plaintiff's damages were not causally related to the incident. Prior to the trial, the Plaintiff's medical expert provided a report in which he opined that the herniation may have been causally related to the accident. However, on cross examination, the Plaintiff's expert was pro-

vided with several medical records dated prior to the incident which clearly indicated that the Plaintiff had ongoing back and disc problems for several years. After being confronted with new information and records, Plaintiff's expert recanted his prior opinion and admitted on the stand that since he was not provided with all of the Plaintiff's medical history he could not provide an opinion as to whether or not the disc herniation was related to the accident. Moreover, the Plaintiff's expert testified that he only received 1% of the Plaintiff's medical records necessary to make

a diagnosis.

On cross examination it was apparent that the Plaintiff chose to provide the expert with only portions of the Plaintiff's medical records and ignored any issue regarding prior injuries. After the cross examination of the Plaintiff's expert, the Plaintiff had no evidence that the herniated disc was causally related to the incident. After the parties' closing, the jury deliberated approximately two hours and ultimately came back with a defense verdict.

## Gibson & Behman Secures Defense Verdict in Negligent Security Case, continued

*(Continued from page 1)*

inadequate. He also testified that given the Porthole's notice of prior incidents in the parking lot, additional doormen and a detail police officer should have been employed on this Sunday evening of a long holiday, as were traditionally employed on its busier Friday and Saturday nights. He also testified that additional lighting and surveillance cameras near the entrance and in the parking lot would have deterred criminal activities in the parking lot, and would most likely have prevented the assault. During cross-examination, defense counsel highlighted the fact that the security consultant had no experience in managing a restaurant or tavern, and never provided the names of any family-owned restaurants where he supposedly provided se-

curity consulting services and training. The Plaintiff's treating psychiatrist also testified regarding the effect the assault on his underlying mental illness. However, on cross-examination the psychiatrist admitted that the Plaintiff had returned to his pre-assault baseline within six to seven months after the assault, not years afterward as claimed by the Plaintiff.

The case was tried before a jury over six days in Essex Superior Court, Lawrence, Massachusetts, beginning on April 4, 2006. Attorneys Scott R. Behman and Daniel J. Shanahan of Gibson & Behman, P.C., represented the Porthole Restaurant & Pub. The defense asserted that the security employed by the Porthole on the night of the incident was reasonable and the assault

was sudden and unexpected. In fact, anticipating a better than average Sunday night crowd, in addition to the usually scheduled doorman, the Porthole's manager had scheduled additional security that evening. The defense presented evidence that the assault occurred within seconds after the Plaintiff and his companion left the restaurant, which prompted an immediate response from the Porthole's security staff. The assailants eventually fled by car and were never apprehended.

After a week of hearing the evidence and approximately two hours of deliberation, the jury returned with a verdict finding that the Porthole was not negligent. The Plaintiff's initial demand was \$350,000.

# M a s s a c h u s e t t s

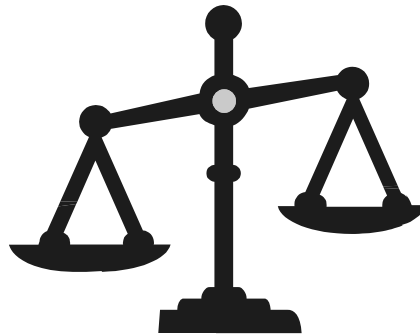
## Gibson & Behman Obtains Defense Verdict in Massachusetts Wrongful Death Dram Shop Action

On December 21, 2005, Attorneys Scott R. Behman and William P. Antonoff of Gibson & Behman's Burlington office obtained a defense verdict on behalf of the Office Bar and Grille in a Massachusetts Dram Shop action tried over a two week period at the Superior Court in Lawrence. The Plaintiff had made a multi-million dollar demand prior to trial.

In *Estate of Jennifer D'Amour v. Jamie Dennis and JGK Enterprises, LLC d/b/a the Office Bar and Grille*, the Plaintiff alleged that employees of the Office Bar and Grille negligently served alcohol to an intoxicated patron, Co-Defendant Jamie Dennis, resulting in the death of Jennifer D'Amour. The Plaintiff further alleged that Dennis negligently operated a motor vehicle, but settled with Dennis prior to trial.

On the evening of May 7, 1999, Jamie Dennis was at the Office Bar and Grille to meet co-workers and consumed four or five Heineken beers between approximately 7:00 and 10:45 p.m. Thereafter, he consumed either water or a soft drink until leaving at 12:18 a.m. After leaving the Office Bar and Grille, Dennis was traveling on I-93 North in Andover, MA. Just prior to the D'Amour-Dennis motor vehicle accident, Jennifer D'Amour lost control of her vehicle and crashed into the

guardrail in the left hand lane. After hitting the guardrail, the D'Amour vehicle came to a stop straddling the first and second travel lanes with its lights out. Shortly thereafter, the vehicle operated by Dennis struck the D'Amour vehicle at a high rate of speed resulting in the death of Jennifer D'Amour. Dennis was not given a breathalyzer and refused a blood test, but numerous police officers and independent witnesses testified that he exhibited signs of intoxication at the accident scene and hospital where he received treatment.



At trial, the Plaintiff was not able to prove that Jamie Dennis was exhibiting signs of intoxication prior to being served his last alcoholic beverage at the Office Bar and Grille. Accordingly, the Plaintiff was unable to prove his case after offering evidence that Dennis exhibited signs of intoxication at the accident scene and the hospital where he was taken for medical treatment following the motor vehicle accident. The

defense explained that Dennis may have staggered, had blood shot eyes and/or slurred his speech of as a result of striking his head against the windshield of his vehicle at 65 miles per hour.

This case demonstrates that insurers should not be threatened into paying liquor liability claims solely on the basis of an arrest and/or police investigation indicating the drinker exhibited signs of intoxication at the accident scene absent evidence of obvious and discernable signs of intoxication at the time of last service. *Vickowski v. Polish American Citizens Club of Town of Deerfield, Inc.*, 422 Mass. 606, 610-12 (1999).

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