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or deputy sheriff of any county; or (c) a member of a municipal police department *under civil service*.

Also the court stated that the West Virginia Code, [ch. 17C, art. 5A, §5 (Michie Supp. 1971)] required that the test be performed in accordance with methods and standards approved by the State Department of Health.

The state did show that the test was given incident to a lawful arrest. However, there was no showing that the test was administered at the direction of the arresting officer. Nor did the state show that the municipal police force was under civil service. The state also did not show that the test was administered according to methods approved by the State Department of Health. This the court said *must* be shown before the evidence can be admitted. However the State Department of Health, as of this writing, has not formulated any methods and standards by which the test could be administered. Until these standards are issued the Breathalyzer test would appear to be incompetent evidence in a West Virginia courtroom.

Torts—Liability Imposed on General Contractor For Independent Contractor's Negligence

Defendant Crown Construction Co., a general contractor, contracted with the Kent Steel Co. to erect the steel framework of buildings for a shopping center. As an independent contractor, Kent supplied all materials, personnel, and supervision required to accomplish its portion of the project. A power crane, supplied by Kent and used to handle steel for the project, had slipped two times because of a defective clutch. The defendant had become aware of the crane's faulty condition. The plaintiff, Summers, an ironworker employed by Kent, was severely injured when on a third occasion the crane dropped a load of steel. Summers sued Crown for negligence in the federal district court. The jury returned a verdict for plaintiff and defendant appealed to the Court of Appeals for the Fourth Circuit. *Held*: judgment affirmed. Evidence proved that Crown had retained general authority to enforce the safety precautions to be taken by its independent contractors. The accident resulted in part from a failure of Crown to exercise this authority to force Kent to have the defective crane fixed, especially after the defendant became aware of its

dangerous condition. *Summers v. Crown Construction Co.*, Civil No. 71-1463 (4th Cir., Jan. 12, 1972).

The defendant relied upon the rule, recognized in West Virginia, that a general contractor is not liable for the negligence of an independent contractor that it has employed. *Chenoweth v. Settle Engineers, Inc.*, 151 W. Va. 830, 156 S.E.2d 297 (1967); *Law v. Phillips*, 136 W. Va. 761, 68 S.E.2d 452 (1952). However, an exception to this rule exists where a general contractor retains control over any part of the work and fails to exercise reasonable care for the protection of others or to stop dangerous activity of which it acquires knowledge. W. PROSSER, LAW OF TORTS 481 (3d ed. 1964). Although the Supreme Court of Appeals of West Virginia has not had opportunity to apply this exception, the Fourth Circuit held that the district judge "was fully justified in believing that the Court [the West Virginia Court] approved it." Civil No. 71-1463 at 5.

In *Chenoweth* the general contractor had retained no contractual right "to enforce or require any safety precautions." 151 W. Va. at 839, 156 S.E.2d at 302. The court in *Summers* reasoned that by inference, had there been a retention of control in *Chenoweth* over the safety practices by the general contractor, it would have been liable due to its own negligence in failing to enforce those safety practices. Although there was no written contract between Crown and Kent, the retention of the right to prohibit Kent from continuing to do its work in a dangerous manner was amply established by the testimony of Crown's senior employees. Thus *Summers* was held to fall clearly within the inference created in *Chenoweth*. See Brown, *Liability for the Torts of Independent Contractors in West Virginia*, 55 W. VA. L. REV. 216 (1953) in which the author discussed the exceptions recognized by West Virginia to the rule that a general contractor is not liable for the negligence of its independent contractors.

Wrongful Death Action—Death of Viable Unborn Child from Prenatal Injury

Plaintiff's decedent, a viable infant *en ventre sa mere*, was still-born two days after his mother, a guest passenger, was seriously injured in an automobile accident. The official cause of the infant's