White, 382 Pa.Super. 478, 555 A.2d 1299 (1989), the Court that 23 PC 401 (d) (10), as amended, compels the court to consider tax consequences. We believe, as a matter of law, tax ramifications must be considered when valuing a pension plan.

Because the value of the pension plan has a considerable impact on the ultimate distribution decision, and because we believe both Husband's and Wife's experts erred in valuing the pension plan, we remand to the master for a revaluation of the pension plan consistent with this opinion.

ORDER OF COURT

NOW, January 17, 1990, the record in the above-captioned report is remanded to the Master for the purpose of receiving additional expert testimony consistent with the opinion appended hereto.

LARACUENTE, ADMRX. V. QUEEN, ET AL., C.P. Franklin County Branch, No. A.D. 1987-91

Negligence - Duty of Care - Inspection of Premises

1. Where an insurance company inspects property prior to issuing a fire insurance policy, its failure to require fire detection devices is not negligence as to the death by fire of a party.

2. The purpose of the insurance company's inspection was not to protect life but for the protection of the insured property.

Richard H. Wix, Esq., Counsel for Plaintiff.
William J. Peters, Esq., Counsel for Defendant/Aetna Casualty & Surety Company

OPINION AND ORDER

KELLER, P.J., January 10, 1990:

On April 27, 1985, a fire occurred at the property owned by

defendants Robert A. Queen, Jr. and Janice G. Queen. Edwin Laracuente, plaintiff's decedent, died as a result of the fire.

The defendants/Queen were the landlords of the decedent who had sublet a third-floor apartment in their property.

On April 20, 1987, plaintiff, as administratrix of decedent's estate, instituted suit against Robert A. Queen, Jr. and Joyce G. Queen, his wife, and Aetna Casualty & Surety Company for the death of Edwin Laracuente. On the same date she instituted a separate action against Motorola Incorporated. On or about November 16, 1987, defendant/Motorola, Inc. joined as additional defendants Robert A. Queen, Jr., Janice G. Queen, and Aetna Casualty & Surety Company. On January 31, 1989, Aetna Casualty & Surety Co. filed a motion for consolidation of these cases under Pa. R.C.P. 213(A). On March 9, 1989, the motion was granted.

On or about February 18, 1988, Aetna Casualty & Surety Company filed preliminary objections in the nature of a motion to strike, and a demurrer. The case was not listed for argument until the November 1989 Argument Court. Defendant's brief was timely received on October 19, 1989. Plaintiff did not submit a brief and offered no explanation for his non-compliance with Local Rules 39-211, et seq. On November 2, 1989, oral argument was scheduled and heard before this court. Only counsel for defendant/Aetna Casualty & Surety Company appeared to argue the preliminary objections. Plaintiff's counsel was notified by the court administrator that argument would proceed without him if he failed to appear. Plaintiff's counsel never contacted this court or the court administrator to offer a reason or explanation for the failure to submit a brief or appear at the time set for argument. Proper notice was sent to plaintiff's counsel advising of the time for argument court.

Preliminarily, we are compelled to find the failure of plaintiff's counsel to file a brief or appear for argument inexplicable and enexcusable. Such non-professional conduct constitutes a disservice to client and to the court. Plaintiff's counsel is herewith censored for his non-compliance with the Local Rules of this Court.

This case is now ripe for disposition.

When considering a preliminary objection in the nature of a

demurrer, every material and relevant fact well pleaded in the complaint, and every inference fairly deducible there-from are to be taken as true. *Otto vs. American Mutual Inc. Co.*, 241 Pa. Super. 423, 361 A.2d 815 (1976). The demurrer "admits all relevant facts sufficiently pleaded in the complaint, and all inferences fairly deducible therefrom, but not conclusions of law or unjustified inferences". *DeSantes vs. Swigart,* 296 Pa. Super. 283, 286, 442 A.2d 770, 772 (1982). The issure raised by a demurrer is whether upon the facts averred the law says with certainty that the claim or defense is no good, and if there is any doubt as to whether the demurrer should be sustained, it should be resolved by refusing to sustain the demurrer. *Otto, supra.*

It is a fundamental rule of tort law that a negligence claim must fail if it is based on circumstances for which the law imposes no duty of care on the defendant. *Fizz vs. Kurtz, Dowd & Nuss, Inc.,* 360 Pa. Super. 151, 519 A.2d 1037 (1987); *Gerace vs. Holmes Protection of Philadelphia,* 357 Pa. Super. 467, 516 A.2d 354 (1986). In a negligence action, the plaintiffs must establish the duty owed by the defendants, and the breach of which might give rise to injuries alleged to be suffered by the plaintiffs. No negligence claim can be based upon a state of facts on which the law does not impose a duty upon the defendants in favor of the plaintiff. *Otto,* 241 Pa. Super. 423, 361 A.2d 815 (1976).

In plaintiff's complaint she alleges that defendant/company insured the premised owned by defendants, Mr. and Mrs. Queen in carrying out inspections of the property. Plaintiff alleges defendant/Aetna's failure to take action to force the Queens to install proper fire detection devices was a direct cause of decedent, Edwin Laracuente's death.

We, however, find that Plaintiff's complaint fails to allege the essential facts to establish a duty imposed by the insurance contract or by the nature of the under-taking to support a negligence action. The complaint pleads conclusory averments of contractual obligations giving rise to a duty without specifying the provisions creating the duty. The plaintiff does not allege a statutory or common law duty is imposed on insurers to inspect the premises of their insureds; not do they claim that the insurance contract provided for inspections.

Plaintiff alleges that since defendant/Aetna inspected the premises it is responsible for the decedent's death, for its negligent failure to compel the Queens to install smoke detectors. The purpose of Aetna's inspection of the premise was not for the protection of life but for the protection of the insured property. Aetna insured the Queens for loss of property and contracted to reimburse the Queens for property loss due to fire. The policy was not for the loss of life but for the loss of property. The company's inspection presumably was for the purpose of checking the property and the value of the property it was insuring. See *Isaacson vs. Mobil Propane Corp.,* 315 Pa. Super. 42, 461 A.2d 625 (1983). (Limited purpose of inspecting for sanitation condition).

We conclude none of the allegations of the complaint establish a duty in defendant/company toward plaintiff's decedent because there are no averments that the inspections were part of any contract or any other legal obligation undertaken by Aetna, or that they adversely affected the plaintiff's decedent.

Furthermore, even if we assume arguendo that a legal duty was owed by defendant to plaintiff's decedent by reason of its undertaking to inspect the premises, there would still be no cause of action stated. Restatement 2d, Torts §323 (1965) states:

> Negligent Performance of Undertaking to Render Services.
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:
>
> (a) his failure to excercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

The importance of this section is that the negligent performance or non-performance must increase the risk of harm or that there must be reliance by the plaintiff's decedent upon the defendant's performing the service it has undertaken to render. The complaint fails to aver either element, and therefore we find it alleges no cause of action under Section 323.

Section 324A of the Restatement of Torts 2d (1977) states the general rule regarding liability to a third person who is injured as a result of a defendant's negligent performance of an undertaking to perform services for another. See *Fizz, supra, Gerace, supra.*

> 324A. Liability to Third Persons for Negligent Performance of Undertaking.
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to excercise reasonable care to protect his undertaking, if
>
> (a) his failure to excercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

We find that the complaint fails to allege any of the requisite elements above set forth, and therefore no cause of action was alleged. Any inspection performed by Aetna of the insured's premises for fire hazard did not demonstrate an undertaking to render fire inspection and prevention services to the insured or the decedent. Aetna was insuring the Queens for loss of property that could be destroyed in a fire on the insured premises.

We find that the complaint set forth no cause of action against defendant/Aetna in that plaintiff failed to allege any duty that was owed from Aetna to the decendent or a reliance by the decendent on Aetna's inspection of the premises for his safety or the failure of which increased the harm of the decedent. Therefore, defendant/Aetna's preliminary objection will be sustained.

ORDER OF COURT

NOW, this 10th day, of January, 1990, the preliminary objection of Aetna Casualty & Surety Company in the nature of a demurrer, is sustained.

The plaintiff is granted leave to file an amended complaint within twenty (20) days of date hereof.

Exceptions are granted the plaintiff.

STONER, ET UX. VS. ARMSTRONG, ET AL., C.P. Franklin County Branch, No. A.D. 1989-71

Strict Liability - Improper Construction

1. A demurrer will not be granted unless there is a certainty that no recovery is possible.

2. Where a claim for defective construction of a chimney is based on strict liability, a demurrer will not be granted because the case law is not free from doubt.

Howard D. Kauffman, Esquire, Counsel for Plaintiffs
John N. Keller, Esquire, Counsel for Defendants

WALKER, J., October 13, 1989:

STATEMENT OF FACTS

The defendants built a house for the plaintiffs. On March 9, 1987, this house was completely destroyed by fire. Plaintiffs allege that the fire was caused by an improperly constructed chimney. Plaintiffs filed this suit against defendants on July 3, 1989, and filed an amended complaint on July 24, 1989. In their complaints the plaintiffs seek recovery from defendants on theories of negligence, breach of warranty, breach of contract, and strict liability. The defendant filed a demurrer to the strict liability cause of action. This issure was argued before the court on October 5, 1989, and is now ripe for determination.

DISCUSSION

When ruling on a demurrer, the determination to be made is whether, on the facts averred, the law says with certainty that no recovery is possible. *Mahoney v. Furches,* 503 Pa. 60, 468 A.2d 458