The questions refused were:

12. Will the fact that the defendants practice medicine in the local area, lead you to require in the local area, lead you to require more evidence to bring back a verdict against Drs. Rector and Stader than you would require to bring back a verdict from outside this area?

19. Have any of you, or any of your immediate family received medical treatment for a life-threatening or serious medical problem? Was there anything about that experience which would cause you to feel personally indebted to the medical profession?

20. Is there anyone here who feels personally indebted to the medical profession for any other reason?

Neither the commonwealth nor the defendant is entitled on the voir dire of the jury to inquire concerning what the jurors present impressions or opinions are. "The only question . . . is whether they have formed a fixed opinion." *Starr v. Allegheny General Hospital,* supra. quoting *Commonwealth v. McGrew,* 375 Pa. 518, 524, 100 A.2d 457, 470 (1953).

Question twelve alluding to different standards for local and non-local physicians invited confusion. None of the questions would necessarily draw responses signifying fixed opinions.

The plaintiff's underlying concern of possible bias relating to medical malpractice actions was properly addressed during voir dire examination by the Court. The Court inquired whether any prospective juror, or a member of his immediate family, is presently under the continuing care of a doctor. Receiving an affirmative response, the Court probed further:

I now ask you this question, is there anything about the experiences that you have with members of your family which would prevent you from rendering a just and true verdict based solely on the evidence presented, the arguments of counsel and the charge of the Court? (N.T. p. 23).

The Court also inquired whether any of the prospective jurors or members of their immediate families had ever been employed as a doctor, nurse or hospital worker and whether any of them or their immediate families had ever filed a suit against a doctor or hospital for professional malpractice. The plaintiff's questions were properly denied. The questions asked by the Court adequately protected the plaintiff's right to a fair and impartial jury.

We feel it appropriate to observe that the plaintiff does not contend that the disallowance of her voir dire questions resulted in any prejudice or affected the ultimate verdict of the jury. After carefully reviewing the voir dire proceeding, we are satisfied that the plaintiff was not denied the opportunity to expose possible bias and that the voir dire examination assured the plaintiff a fair and impartial jury.

Parenthetically, we are constrained to observe that the list of jurors was available to plaintiff for an extended time so an investigation of all potential jurors could have been made. Apparently plaintiff sought to substitute the voir dire for a personal investigation.

ORDER OF COURT

NOW, this 17th day of December, 1985, the motion of Anne V. Peters, plaintiff, for a new trial is denied.

Exceptions are granted the plaintiff.

RADBILL V. CHAMBERSBURG HOSPITAL, C.P. FRANKLIN COUNTY BRANCH, A.D. 1985 - 186

Negligence - Duty - Good Samaritan

1. A claim of negligence cannot be predicated on facts in which the law does not impose a duty on the defendant.

2. Where plaintiff alleges defendant did not prescribe a home cardio-respirator monitor in response to a question at a health care class sponsored by defendant hospital, there is no privity between the plaintiff and defendant which might create a duty.

3. Where plaintiff fails to allege defendant's recognition of the necessity of his services for the protection of the plaintiff, no duty is placed on the defendant under the good samaritan rule.

Jan G. Sulcove, Esquire, Counsel for Plaintiffs
Jeffrey D. Wright, Esquire, Attorney for Defendant/Hartman

OPINION AND ORDER

KELLER, J., December 31, 1985

The plaintiffs filed a complaint against Owen W. Hartman, M.D., et al. on July 30, 1985. Count I of the complaint alleged the wrongful death of their infant son, Jordan. Count II alleged a survival action for the loss of his future earnings. Preliminary objections in the nature of a demurrer were filed by Dr. Hartman, hereafter defendant, on August 9, 1985. Briefs were submitted and oral arguments were heard at the November Argument Court. The matter is now ripe for disposition.

In considering preliminary objections in the nature of a demurrer, the issue is whether, on the facts averred, it can be determined with certainty that no recovery is possible. *Bartanus v. Lis,* 332 Pa. Super. 48, 480 A.2d 1178 (1984). If there is any doubt, it should be resolved in favor of overruling demurrer; summary judgment should be entered only in cases which are clear and free from doubt. *Chorba v. Davlisa Enterprises,* 303 Pa. Super. 497, 450 A.2d 36 (1982).

Plaintiffs contend that their complaint stated a cause of action against defendant in negligence. The necessary elements to maintain an action in negligence are a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct, a failure to conform to that standard, a casual connection between the conduct and the resulting injury and actual loss or damage resulting to the interest of another. *Morena v. South Hill Health System,* 501 Pa. 634, 462 A.2d 680 (1983). In the case at bar, the plaintiffs allege that in August 1984 they attended a health care class at the Chambersburg Hospital conducted by the defendant. Plaintiffs aver that they asked the defendant whether any special arrangements should be made for subsequent children when one parent had previously had a child who had died

of Sudden Infant Death Syndrome, and that defendant answered negatively. The question of law is whether these facts establish a duty flowing from the defendant to the plaintiffs and the plaintiffs' decedent, the breach of which would create a cause of action in negligence. A duty in any given situation is predicated on the relationship between the parties at the relevant time. *Morena,* supra. In this case, the only relationship that can be inferred from the complaint was one between a lecturer and listener or teacher and student. Yet, the negligent breach alleged is the failure of the defendant to prescribe a home cardio-respiratory monitor for the decedent. After carefully reviewing the complaint, we find no privity between the plaintiffs and the defendant which might have created a duty in the defendant to recommend the future use of a home cardio-respiratory monitor for the plaintiff's unborn child. A negligence claim cannot be predicated upon a state of facts in which the law does not impose a duty on the defendant in favor of the plaintiff. *Boyce v. U.S. Steel,* 446 Pa. 226, 285 A.2d 459 (1971). Having failed to allege a duty recognized by law, the defendant's demurrer must be sustained.

In their effort to identify a duty recognized by law, the defendants also rely on the "good Samaritan" rule: One who undertakes, whether gratuitously or for consideration, to render services to another is held liable for the negligent rendering of those services if the negligence causes injury either to the person on whose behalf the services are being performed or to a forseeable third party. *Pascarella v. Kelley,* 378 Pa. 18, 105 A.2d 70 (1954), *Hamil v. Bashline,* 224 Pa. Super. 407, 307 A.2d 37 (1973), allocatur refused 224 Pa. Super. XXXVI. The rule articulated in Restatement (Second) of Torts § 323 and 324A is recognized as a correct statement of Pennsylvania law. *Hamil v. Bashline,* supra.

Section 323 provides:

> 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 failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Section 324A provides:

> Liability to Third Person 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 exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise 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.

The threshold issue under the Good Samaritan rule is whether the party charged undertook a duty to the person for whom the services were performed or to an injured third party. *Santillo v. Chambersburg Engineering Co.,* 603 F. Supp. 211 (1985). The scope of the good Samaritan's duty is measured by the scope of his undertaking. *Klein v. Council of Chemical Associations,* 587 F. Supp. 213 (1984). This means an undertaking in fact, not merely the expectation of one or the legal right to pursue one. *DeJesus v. Liberty Mutual Insurance,* 423 Pa. 198, 223 A.2d 849 (1966). The plaintiffs averred that the defendant conducted a health care class in which they participated; however, the plaintiffs have failed to state any facts to establish that the defendant assumed any broader role or greater responsibilities than the transmission of general information. Pennsylvania's adoption of Section 323 of the Restatement (Second) of Torts, does not create a duty where one does not exist and does not change the burden of a plaintiff to establish the underlying elements of an action in negligence. *Morena,* supra.

The plaintiffs have failed to allege the material facts necessary to proceed under §§ 323 and 324A. Their complaint must assert allegations sufficient to establish the legal requirement that the defendant has undertaken to render services which he should recognize as necessary for the protection of a third person. *Cantwell v. Allegheny County,* 506 Pa. 35, 483 A.2d 1350 (1984), *Santillo,* supra. The plaintiffs have failed to allege recognition by the defendant of the necessity of his services for the protection of the plaintiffs or their decedent.

The plaintiffs have also failed to state facts reaching the causation factors under the rule. The thrust of § 323 is that negligent performance or nonperformance must increase the risk of harm and that there must be reliance by the injured party upon the defendant's performing the service he has undertaken to render. *DeJesus,* supra. Allegations that harm "results" from the negligence charged is inadequate unless the harm is caused by increased risk or reliance. *Blessing v. United States,* 447 F. Supp. 1160 (3rd Cir. 1978). Plaintiffs' boiler-plate allegation that, "The death of the decedent, Jordan Tobey Stefan Radbill, occurred solely and proximately as the result of the negligence of the defendants," is inadequate. "Increased risk" means some physical change to the environment or some other material alteration of circumstances. *Patentas v. United States,* 687 F.2d 707 (3rd Cir. 1982). "Reliance" means that the plaintiff was induced to forego other remedies or precautions. *Id.* Since the plaintiffs have failed to address the issues of increased risk or reliance, they may not proceed under the theories of §§ 323 and 324A.

Plaintiffs' third theory of liability rests on the Restatement (Second) of Torts § 311 which provides:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other, or
> (b) to such third persons as the actor should expect to be put in peril by the action taken.
>
> (2) Such negligence may consist of failure to exercise reasonable care
>
> (a) in ascertaining the accuracy of the information, or
> (b) in the manner in which it is communicated.

Here, liability is predicated on the transmission of false information, which the plaintiff reasonably relies on to his physical harm. *English v. Lehigh City Authority,* 286 Pa. Super. 312, 428 A.2d 1343 (1981). We perceive two fatal errors in plaintiffs' position. First, Section 311 provides for liability for one who negligently gives false information and not when a person negligently fails to inform. *English,* supra. The negligence alleged in the plaintiffs'

complaint is the defendant's failure to prescribe a home cardio-respiratory monitor. Section 311 does not provide liability for such an omission. Second, the rule requires reasonable reliance by the plaintiff. In this case, the plaintiffs have not alleged such reliance in their complaint. Therefore, the plaintiffs have failed to state a claim under Section 311.

ORDER OF COURT

NOW, this 31st day of December, 1985, the preliminary objection in the nature of a demurrer of defendant, Owen W. Hartman, is sustained. The plaintiffs are granted twenty (20) days from date hereof to file an amended complaint.

Exceptions are granted the plaintiffs.

RIDGE, ET AL. VS. GIBBLE C.P. Franklin County Branch, Civil Action, Vol 7, Page 360

Equity - Flow of Stream - Change - Damages

1. A landowner has the right to have surface water that flows on or over his land discharged onto another's land in furtherance of the proper use of the land.

2. An upper landowner may be liable to a lower landowner where water is diverted from its natural channel, there is an unreasonable change in the quantity of water, there is negligence causing unnecessary damage or an artificial channel collects or discharges water in greatly increased quantity.

3. A property owner may recover both remedial and permanent damages where the property's fair market value is reduced even with repairs.

Eugene E. Dice, Esq., Attorney for Plaintiffs
Denis M. DiLoreto, Esq., Attorney for Defendants

OPINION AND ORDER

WALKER, J. April 2, 1986