THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

05-C-0321

STEPHEN AND CARLA ALLEN

v.

ALPHONSE KROETEN, SHAWN HOWARD, LAURA HUBACZ, KEITH DESHARNAIS, JASON BRAGDON, AND DANIEL BUCCIANO

ORDER ON PLAINTIFF'S MOTION TO ALLOW ENTRY OF AMENDED DECLARATION

The plaintiffs, Stephen and Carla Allen, have brought a civil action against multiple defendants, Alphonse Kroeten, Shawn Howard, Laura Hubacz, Keith Desharnais, Jason Bragdon, and Daniel Bucciano (collectively "the defendants"), alleging separate claims of negligence against each of them. Presently before the Court is the Plaintiff's Motion To Allow Entry Of Amended Declaration, in which the plaintiffs seek to add a seventh count alleging *res ipsa loquitur* against all the defendants. Defendant Shawn Howard ("Howard") objects, and in addition, moves to dismiss Count VII if the plaintiffs are permitted to amend their declaration.[1] For the reasons set forth herein, the plaintiffs' motion is granted, and Howard's motion to dismiss is denied.

---

[1] The plaintiffs also seek to change the name of plaintiffs' counsel from Wiggin & Nourie, P.A. to McDowell & Osburn, P.A. Defendant Howard does not object to this portion of the amended

The following alleged facts are relevant for the purposes of this order. The plaintiffs were the owners of certain property located on 56 Elm Street in Goffstown, New Hampshire ("the property"). On October 19, 2003, the defendants (or "all or some of them") were allegedly smoking, drinking alcohol, and lighting other combustible materials in the barn, which is located on the property. (Amended Decl. at ¶ 12.) A fire ignited in the barn in the early morning hours of that day. As a result of the fire, the property and barn were damaged. The investigating Fire Marshall, John Raymond, determined that the fire was caused by careless disposal of smoking materials.

Based on the above events, the plaintiffs have brought six counts of negligence against each of the defendants individually. The plaintiffs now move to allow entry of their amended declaration, which alleges an additional seventh count ("Count VII") against all the defendants. This count alleges *res ipsa loquitur* and joint and several liability for those defendants having control over smoking materials. Specifically, the plaintiffs assert that "[t]he careless disposal of smoking materials...such that the plaintiffs' property was set on fire is not the sort of accident that would ordinarily occur without one or more of the defendants acting negligently...." (Pl.'s Mot. For Entry of Am. Decl. at ¶ 59) ("Pl.'s Mot."). Further, the plaintiffs submit that the smoking materials were in the joint and exclusive control of one or more of the defendants, and the defendants are in exclusive possession of the knowledge and evidence regarding which defendant or defendants was careless and negligent in disposing of smoking materials.

---

declaration. This portion of the plaintiff's motion is granted and will not be further addressed in this order.

Therefore, the plaintiffs argue that "the defendants bear the burden of showing which of them was so negligent or not so negligent and any failure of such proof results in all of the defendants who had control over the smoking materials being held jointly and severally liable for the careless and negligent disposal of smoking materials…." (Pl.'s Mot. at ¶ 62.)

Defendant Howard objects, arguing that the addition of Count VII is a substantive change to the declaration that introduces a new cause of action. Howard further contends that the New Hampshire Supreme Court has never applied *res ipsa loquitur* to a case involving multiple defendants, and that, in consequence, the plaintiffs have failed to state a proper claim involving *res ipsa loquitur*. Additionally, Howard asserts that the plaintiffs point to no New Hampshire law supportive of "their novel theory of joint and several liability." (Def. Howard's Obj. To Pl.'s Mot. at ¶ 15.)

Howard also submits that the plaintiffs' advanced new cause of action involving *res ipsa loquitur* and joint and several liability fails because the plaintiffs have not sufficiently alleged that the fire is the kind of accident that did not occur without Howard's negligence. Howard emphasizes that the plaintiffs' declaration fails to allege who started the fire and fails to establish that Howard was in exclusive control of the smoking materials.

"A motion to amend raises an issue subject to the trial court's discretion." Kenneth E. Curran, Inc. v. Auclair Transportation, Inc., 128 N.H. 743, 746 (1986) (citation omitted). Generally, "[a]mendments to pleadings are to be liberally allowed." LaRoche, Adm'r v. Doe, 134 N.H. 562, 568 (1991) (citing Curran, 128

N.H. at 746). However, the liberality of this rule "applies only if the amendment would not change the cause of action or call for substantially different evidence." Curran, 128 N.H. at 746 (quotations and citations omitted). However, "substantive amendments" may certainly be allowed "when necessary to prevent injustice[,]" Thomas v. Telegraph Publishing Co., 151 N.H. 435, 439 (2004), and remains within the Court's fair discretion. Id.

For the doctrine of *res ipsa loquitur* to generally apply, "it is necessary that (1) the accident be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) other responsible causes are sufficiently eliminated by the evidence." Rowe v. Public Serv. Co. of New Hampshire, 115 N.H. 397, 399 (1975) (citing Smith v. Coca Cola Bottling Co., 97 N.H. 522, 524 (1952) and RESTATEMENT (SECOND) OF TORTS § 328 D (1) (1965)). The New Hampshire Supreme Court has generally explained that the rule of *res ipsa loquitur* "is merely a rule identifying the elements of circumstantial evidence that are sufficient to get a plaintiff's case to the jury and allow the jury to return a plaintiff's verdict." Cowan v. Tyrolean Ski Area, Inc., 127 N.H. 397, 400 (1985) (citing Smith, 97 N.H. at 524); see also Gobbi v. Moulton, 108 N.H. 183, 185 (1967). "This doctrine does not do away with the well established rules of law that a person asserting negligence has the burden of proof and that the mere fact of injury does not indicate negligence on the part of anyone." Rowe, 115 N.H. at 399 (citing Gobbi, 108 N.H. at 185).

In LaRoche, the New Hampshire Supreme Court addressed the trial court's denial of the plaintiff's motion for leave to amend his writ to include the names of other defendants in his negligence action, where the amendment was premised upon the theory of *res ipsa loquitur*. 134 N.H. at 565, 568-569. Initially, the LaRoche plaintiff brought a negligence action against an unidentified Jane Doe defendant. Id. at 568. After the trial court "dismissed the action against Jane Doe because she was not a sufficiently identified defendant[,]" the plaintiff moved for leave to amend his writ by adding as defendants four individuals, "one of whom (he asserted) was Jane Doe." Id. at 565 (parenthetical in original). The trial court denied the plaintiff's motion for leave to amend and came to finally dismiss the action. Id. On appeal, the plaintiff argued that the trial court should have allowed him to amend his writ because his amendment "advanced a theory that the four named [individuals] could be found liable under the doctrine of *res ipsa loquitur*...." Id. at 569.

In considering the plaintiff's arguments, the LaRoche Court noted it had "never had an occasion to apply the doctrine [of *res ipsa loquitur*] in a case involving multiple defendants" and "decline[d] the plaintiff's invitation to do so...because he [had] not persuaded [the court] that it was error for the trial court to deny his motion for leave to amend." Id. at 568 (citations omitted). In assessing the plaintiff's motion for leave to amend, the LaRoche Court noted that the plaintiff's amendment "suggested only that he sought to preserve the action for trial by naming four individuals, one of whom might be Jane Doe." Id. at 569. The LaRoche Court emphasized that the plaintiff had not alleged joint control in

his motion to amend, and any contention that the "evidence would have made out a case for joint and exclusive control on the part of the four proposed defendants...should have [been] presented...to the trial court in his motion for leave to amend." Id.

Additionally, the LaRoche Court observed that, while it determined that the trial court properly denied the plaintiff's motion "because the allegations were inadeqate to support the amendment[,]...a trial court [could] also refuse a proffered amendment when it required the court to entertain a new cause of action or to hear substantially new evidence." Id. In the case before it, the LaRoche Court determined, "Amending the writ to support a theory of liability premised upon *res ipsa loquitur* presents both a new cause of action and a requirement that the trial court hear substantially new evidence on new issues." Id. (citation omitted).

Here, the plaintiffs have already sufficiently alleged individual counts of negligence against each of the named defendants. With Count VII, the plaintiffs add no new allegations of fact beyond those pertaining to establishing the applicability of *res ipsa loquitur*; they do no more than seek to provide the defendants, early on, with notice of their intent to invoke the evidentiary rule of *res ipsa loquitur* at trial.

Unlike the situation in LaRoche, the plaintiffs in this case do not seek to amend their declaration in order to add new defendants or solely to preserve the case for trial. Rather, as stated previously, the plaintiffs seek to provide notice of their intention to invoke *res ipsa loquitur* at trial. Further, while the LaRoche

plaintiff failed to allege joint control in his motion for leave to amend, the plaintiffs here have alleged joint and exclusive control together with the other two elements of *res ipsa loquitur.* Thus, the basis of the LaRoche Court's decision to deny the amendment does not properly apply to the instant case. Assuming, without deciding, that at least in some circumstances, it is necessary to allege facts in a complaint or declaration, the Court concludes that, in order to provide notice to the defendants of the plaintiffs' intention to invoke that doctrine at trial and in the interest of justice, the plaintiffs should be permitted to amend their declaration accordingly. In this regard, the Court observes that the plaintiffs brought this action less than one year ago, the statute of limitations has not run, and the plaintiffs at the structuring conference early on gave notice of their intent to amend their declaration.

Howard also argues that the plaintiffs' negligence claim based upon *res ipsa loquitur* fails to state a claim upon which relief may be granted. As such, Howard seeks dismissal of the claim.

"The denial of a motion to dismiss is proper if the plaintiff's allegations are 'reasonably susceptible of a construction that would permit recovery.'" Bohan v. Ritzo, 141 N.H. 210, 212 (1996) (citation omitted). The Court must "engage in a threshold inquiry that tests the facts in the complaint against the applicable law." Dupont v. Aavid Thermal Techs., Inc., 147 N.H. 706, 709 (2002) (quotations and citation omitted). When making this determination, the Court "assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences 'in

the light most favorable to the plaintiff.'" Bohan, 141 N.H. at 213 (citation omitted).

While the LaRoche Court declined to determine whether the doctrine of *res ipsa loquitur* could be applied to a case involving multiple defendants, it did not preclude the theory's application to multiple defendants in a proper case. 134 N.H. at 568.

The plaintiffs cite Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944), in support of their position. In that case, the California Supreme Court permitted the application of the doctrine of *res ipsa loquitur* against multiple defendants where it was "quite clear that not all of [the defendants] could have been responsible." W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS § 39, at 253 (5th ed. 1984) (discussing Ybarra). In Ybarra, the plaintiff suffered a traumatic injury to his shoulder while undergoing an operation for appendicitis. At the time of the surgery, the plaintiff was unconscious. Subsequently, the plaintiff brought a negligence action based upon *res ipsa loquitur* "against all the doctors and hospital employees connected with the operation." Id. at 253. The defendants objected, arguing that because "the injury may have resulted from the separate act of either one of two or more persons, the rule of res ipsa loquitur [could not] be invoked against any of [the defendants]." Ybarra, 154 P.2d at 688-89. Further, the defendants contended that because "there [were] several instrumentalities, and no showing [was] made as to which caused the injury or as to the particular defendant in control of it, the doctrine [could] not apply." Id. at 689.

The California Supreme Court allowed the plaintiff to invoke *res ipsa loquitur*, stating as follows:

> [There has been a] tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine [of *res ipsa loquitur*], and to give too little attention to its basic underlying purpose. The result has been that a simple understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that 'the particular force and justice of the rule, regarded as a presumption throwing upon the party charged with the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.'

Id. (citations omitted). The Ybarra Court reasoned that in the case before it, "[w]ithout the aid of the doctrine[,] a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability." Id.

In applying the elements of *res ipsa loquitur*, the Ybarra Court found that the facts readily supported the first and third elements. Id. at 689-90. Regarding the second element, that of exclusive control, the Ybarra Court explained,

> [W]e do not believe that either the number or relationship of the defendants alone determines whether the doctrine of res ipsa loquitur applies. Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard. Any defendant who negligently injured him, and any defendant charged with his care who so neglected him as to allow injury to occur would be liable....It may appear at trial that...one or more defendants will be found liable and others absolved, but this should not preclude the application of the rule of

> res ipsa loquitur. The control at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants.

Id. at 690. Thus, the Ybarra Court held "that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct." Id. at 691.

To be sure, Ybarra was decided in the context of a medical care case, and its basis of course implications "the special responsibility for the plaintiff's [medical or physical] safety undertaken by everyone concerned." PROSSER & KEETON § 39, at 253. Yet, the force of Ybarra's reasoning is not limited just to certain medical malpractice cases, but favors the application of *res ipsa loquitur* to the singular circumstances presented here. It suffices here to point out that certain other courts have upheld the application of *res ipsa loquitur* to cases not involving medical defendants. See generally, 59 A.L.R. 4th 201, *Applicability of Res Ipsa Loquitur in Case of Multiple, Nonmedical Defendants – Modern Status* (1988).

For the doctrine of *res ipsa loquitur* to be applicable to this case, the plaintiffs must seek to satisfy all three elements of the doctrine. With respect ot the first element, the plaintiffs clearly have alleged that a fire caused by the disposal of smoking materials would not have occurred in the absence of someone's negligence. As to the second element, the plaintiffs allege that the cause of the fire here was the disposal of smoking materials and that these

smoking materials had been in the joint and exclusive control of one or more of the defendants. Howard argues, however, that the plaintiffs' declaration fatally fails to allege who specifically started the fire and that it also fatally fails to specifically assert that Howard, as opposed to another, was in exclusive control of the smoking materials. Yet, in considering whether the defendants, or one or more of them, were in exclusive control over the smoking materials such that *res ipsa loquitur* should be applied to the present case involving multiple defendants, the Court finds the Ybarra Court's reasoning sufficiently persuasive in connection with this motion to dismiss.

As in Ybarra, the plaintiffs have advanced sufficient allegations to the effect that the smoking materials were in the joint and exclusive control of the named defendants. The plaintiffs have sued every possible defendant in this case by bringing this action against all persons present in the barn the night of the fire. Every defendant who was present in the plaintiffs' barn was allegedly bound to exercise ordinary care to see that no unnecessary harm came to the property. They each allegedly had some control over the pertinent smoking materials. As such, any defendant, including Howard, who negligently disposed of, or handled, smoking materials so that damage ensued is subject to liability. Significantly, Howard and the other defendants, as with the Ybarra defendants, are allegedly the only persons who have knowledge regarding the person(s) responsible for the disposal or handling of the smoking materials, and, as a consequence, unless the defendants voluntarily choose to come forward and provide evidence, the plaintiffs would potentially be left without the ability to

recover. The Court concludes that the plaintiffs have alleged sufficient facts to support the second element of *res ipsa loquitur*.

With regard to the third element, the plaintiffs advance the fire marshal's report, which provides that the cause of the fire was the disposal of smoking materials. A fire marshal's report indicating the cause of the fire as disposal of smoking materials is sufficient, on a motion to dismiss, to show that other responsible causes have been eliminated.

The Court concludes that the plaintiffs' allegations under the elements of *res ipsa loquitur* are reasonably susceptible of a construction that may permit recovery. The Court emphasizes that it does no more here than deny the motion to dismiss. Accordingly, and for the reasons stated above, the plaintiffs' Motion For Entry of Amended Declaration is GRANTED and the defendant's Motion To Dismiss is DENIED.[2]

SO ORDERED.

Date: 2/1/06

JOHN M. LEWIS
Presiding Justice

[2] The parties cite Summers v. Tice, 199 P.2d 1 (Cal. 1948), and RESTATEMENT (SECOND) OF TORTS § 328 D (1) (1965)) in connection with burden shifting. The Court does no more at this point than to observe that, depending on the evidence presented at trial, the principles expressed in Summers and the Restatement may apply to this case.