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Amended and Supplemented Bill of Particulars Allowed at Trial Where Original Bill Contained General Allegations of Negligence and Reserved Right To Rely on Res Ipsa Loquitur

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ARTICLE 30 — REMEDIES AND PLEADING

Amended and supplemental bill of particulars allowed at trial where original bill contained general allegations of negligence and reserved right to rely on res ipsa loquitur.

In *Lukaris v. Harrison Vending Systems, Inc.*,⁵⁸ recovery of damages was sought for injury resulting from a fire on plaintiffs' property caused by defendants' vending machine. Their complaint contained general allegations of negligence and their original bill of particulars merely reserved the right to rely upon the theory of *res ipsa loquitur*. At an examination before trial certain specific acts of negligence on the part of defendants came to light. At trial, the plaintiffs moved for permission to serve an amended and supplemental bill of particulars containing allegations of specific negligence as well as *res ipsa loquitur*. The defendants objected on the ground that the original bill of particulars constituted an election by which the plaintiffs were bound. The appellate division, noting that the defendants were aware of the evidence upon which the plaintiffs proposed to rely, held that the granting of the motion to serve an additional and supplemental bill of particulars was a proper exercise of the trial court's discretion.⁵⁹

CPLR 3025(b) provides that a party may amend or supplement his pleading at any time by leave of court or by agreement of all the parties.⁶⁰ However, while the CPLR allows liberal amendment of pleadings, such amendments will not be granted if the other party would be unfairly prejudiced.⁶¹

The *Lukaris* case conforms to the intent of the CPLR to permit discretion in the allowance of amendments. However, it should be noted that amendment, most probably, will only be granted where evidence has been revealed prior to trial which gives defendant notice that plaintiff is alleging specific acts of negligence. Thus, in order to insure the plaintiff every possible benefit, attorneys should include both specific allegations of negligence and reliance on *res ipsa loquitur* in the original bill of particulars, if there is any possibility that both will be relied on at the trial.

⁵⁸ 28 App. Div. 2d 1019, 283 N.Y.S.2d 674 (3d Dep't 1967).

⁵⁹ The appellate division, first department, also allows a liberal exercise of discretion by the court with regard to amendment of pleadings. See *Symphonic Electronic Corp. v. Audio Devices, Inc.*, 24 App. Div. 2d 746, 263 N.Y.S.2d 676 (1st Dep't 1965) (mem.).

⁶⁰ The purpose of CPLR 3025(b) is to permit the widest amount of discretion by the court in the allowance of amendments. 7B MCKINNEY'S CPLR 3025, supp. commentary 150 (1967).

⁶¹ See *Ciunci v. Wella Corp.*, 23 App. Div. 2d 754, 258 N.Y.S.2d 994 (1st Dep't 1965), where the court allowed the defendant to serve an amended answer where it would not be prejudicial to the plaintiff.