

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>DANA DAVIES, et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	<i>Civil No. 94-56-P-DMC</i>
)	
<i>DATAPOINT CORPORATION,</i>)	
)	
<i>Defendant</i>)	

MEMORANDUM DECISION ON PLAINTIFFS' MOTION FOR RECONSIDERATION¹

On October 31, 1995 I issued a Memorandum Decision (Docket No. 38) on the Defendant's Motion to Dismiss and/or for Summary Judgment and Partial Motion *in Limine* ("Defendant's S.J. Motion") (Docket No. 23). As part of that decision, I held that there is no post-sale duty to warn under Maine's strict liability statute, 14 M.R.S.A. § 221. I also declined the plaintiffs' urging that this court recognize a negligence-based post-sale duty to warn in the absence of any indication that the Law Court was prepared to do so. The plaintiffs have moved for reconsideration of these rulings. I grant the motion in part and deny it in part.

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

I. Strict Liability

I deny the plaintiffs' motion to reconsider my decision that there is no post-sale duty to warn under 14 M.R.S.A. § 221. The plaintiffs suggest that I based my decision on dicta in *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 197 (Me. 1990). On the contrary, my decision was grounded in the plain language of section 221, which permits a strict liability claim only against “[o]ne who sells any goods or products in a defective condition.” 14 M.R.S.A. § 221. Because the statute premises liability on the condition of the product *as sold*, post-sale knowledge is irrelevant to liability under section 221. Dicta in the Law Court’s decisions support this interpretation.²

II. Negligence

In my summary judgment decision I relied on *Williams v. Monarch Mach. Tool Co.*, 26 F.3d 228, 232 (1st Cir. 1994), for the proposition that a federal court sitting in diversity should not expand state law if the state has yet to rule on the issue presented. However, based on an exhaustive examination of the context in which *Williams* arose, which context was brought to my attention by the plaintiffs in their motion to reconsider, I find it appropriate to reconsider my decision on the negligence-based post-sale duty-to-warn issue.

In *Williams* the First Circuit affirmed the district court’s refusal to charge the jury concerning

² See *Pottle v. Up-Right, Inc.*, 628 A.2d 672, 674-75 (Me. 1993) (“Strict products liability attaches to a manufacturer when by a defect in design or manufacture, or by the failure to provide adequate warnings about its hazards, a product is sold in a condition unreasonably dangerous to the user.”); *Lorfano*, 569 A.2d at 197 (“We have construed [section 221] as requiring that ‘[a] manufacturer has a responsibility to inform users and consumers of dangers about which he either knows or should know at the time the product is sold.’”) (quoting *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 540 (Me. 1986)).

a duty to warn of post-sale safety improvements to a machine that was not negligently designed. *Id.* at 232-33. The court noted: “We can find no indication that such a rule has been adopted in Massachusetts, whose law governs in this case.” *Id.* at 232. Not only had Massachusetts not yet adopted such a rule, it implied in dicta that it disfavored such a rule. *See Hayes v. Ariens Co.*, 462 N.E.2d 273, 276 (Mass. 1984). Thus, *Williams* warns that, where a state has indicated the boundaries of a legal theory, albeit in dicta, a federal court sitting in diversity will not cross those boundaries. *Williams*, 26 F.3d at 232.³

Such a reading comports with the line of cases preceding *Williams*. In several pre-*Williams* cases, the First Circuit rejected plaintiffs’ requests that the court expand existing state law to grant new causes of action or previously unrecoverable damages. *Porter v. Nutter*, 913 F.2d 37, 39-41 (1st Cir. 1990) (refusing to create exception to New Hampshire rule immunizing coworkers against claims for negligence committed in course of carrying out employer’s nondelegable duty to maintain safe workplace); *Kassel v. Gannett Co.*, 875 F.2d 935, 948-49 (1st Cir. 1989) (refusing to modify New Hampshire rule prohibiting recovery for emotional distress caused by merely negligent defamation, as opposed to malicious defamation); *see also Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 743-44 (1st Cir. 1990) (denying recovery for insurer’s refusal to defend or indemnify because, *inter alia*, New York law required proof of harm resulting from insurer’s conduct in analogous circumstance).

³ It is useful to compare *Williams* with *LaBelle v. McCauley Indus. Corp.*, 649 F.2d 46, 49 (1st Cir. 1981), where the First Circuit expressed no reservations about imposing a post-sale duty to warn although Massachusetts had not yet adopted such a rule. Unlike the situation before the *Williams* court, Massachusetts had already hinted that it would adopt a post-sale duty to warn of product dangers known or discoverable at the time of sale. *See doCanto v. Ametek, Inc.*, 328 N.E.2d 873, 879 n.9 (Mass. 1975) (dicta) (“[T]here may be a duty to give reasonable warning of a product’s dangers which are discovered after sale.”).

I find no indication, even in dicta, whether Maine favors or disfavors a negligence-based post-sale duty to warn. Language in *Pottle*, 628 A.2d at 675, could arguably be read to suggest Maine opposes such a duty.⁴ However, *Pottle* did not involve a post-sale duty-to-warn claim. I am unwilling to give meaning to the Law Court’s words beyond the context in which they were expressed by according them the limiting effect the defendant suggests. Thus, notwithstanding my earlier reliance on it, I now conclude that *Williams* is inapplicable to this case.

Absent controlling state-law precedent, a federal court sitting in diversity has the discretion to certify a state-law question to the state’s highest court, or to predict what the high court would do when the path the state court would take is reasonably clear. *See Lyons v. National Car Rental Sys., Inc.*, 30 F.3d 240, 245 (1st Cir. 1994); *Nieves v. University of Puerto Rico*, 7 F.3d 270, 274-74 (1st Cir. 1993). Finding no controlling state-law precedent, I next consider whether the question satisfies the requirements for certification to the Law Court.

Certification is authorized only if (1) there are no clear controlling precedents in the Law Court’s decisions, and (2) there are involved questions of Maine law which may be “determinative of the cause.” 4 M.R.S.A. § 57. A question of state law may be determinative of the cause when one possible answer will produce a “final disposition of the federal cause.” *White v. Edgar*, 320 A.2d 668, 677 (Me. 1974); *see also Hiram Ricker & Sons v. Students Int’l Meditation Soc’y*, 342 A.2d 262, 264 (Me. 1975) (determinative of the cause “encompasses *any* disposition by which the Federal controversy *is terminated*”) (emphasis in original). Thus, unless one answer to a certified

⁴ “A products liability action for failure to warn requires a three-part analysis: (1) whether the defendant held a duty to warn the plaintiff; (2) whether the actual warning *on the product*, if any, was inadequate; and (3) whether the inadequate warning proximately caused the plaintiff’s injury.” *Pottle*, 628 A.2d at 675 (emphasis added).

question would dispose of this entire case, certification is inappropriate. In this case, I have ruled that the plaintiffs' duty-to-warn claim survives summary judgment when measured at the time of sale. Accordingly, the post-sale duty to warn question will not be "determinative of the cause" as defined by the Law Court.

The task now necessarily falls to this court to predict whether the Law Court would adopt a negligence-based post-sale duty to warn. "Where unsettled questions of law are involved, we can assume that [Maine]'s highest court would adopt the view which, consistent with its precedent, seems best supported by the force of logic and the better-reasoned authorities." *Ryan*, 916 F.2d at 739. As the District of Rhode Island recently recognized in *Piester v. IBM Corp.*, No. 93-0470-P, slip op. at 10 (D.R.I. Sept. 15, 1995), the majority position favors a post-sale duty to warn.⁵

⁵ Based on cases cited in *Piester*, slip op. at 7-10 nn.2, 4, I find that courts have adopted a post-sale duty to warn applicable in eighteen states: *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311, 1318 (7th Cir. 1983) (Wis. law) (manufacturer's duty to warn extends to dangers that arise after marketing); *LaBelle*, 649 F.2d at 49 (Mass. law) (manufacturer's duty to warn extends to purchaser even if defects are discovered after initial sale); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 453 (2d Cir. 1969) (Fla. law) (where defects are discovered after sale, manufacturer has duty to remedy, or if remedy not feasible, to give users warnings and instructions to minimize danger); *Piester*, No. 93-0470-P, slip op. at 10 (R.I. law) (on continuing duty-to-warn claim, plaintiffs may introduce evidence relating to what defendant knew or should have known prior to alleged injury); *Rodriguez v. Besser Co.*, 565 P.2d 1315, 1320 (Ariz. Ct. App. 1977) (dicta) (duty to warn "may be a continuing one applying to dangers the manufacturer discovers after sale"); *Downing v. Overhead Door Corp.*, 707 P.2d 1027, 1033 (Colo. Ct. App. 1985) (duty to warn of danger discovered after sale); *Chrysler Corp. v. Batten*, 450 S.E.2d 208, 211-13 (Ga. 1994) (duty to warn arises whenever manufacturer knows or reasonably should know of danger arising from product use); *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 920-21 (Iowa 1990) (trial judge erred by failing to instruct on post-sale duty to warn); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1313-14 (Kan. 1993) (duty to warn readily identifiable consumers of life-threatening danger discovered after sale); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 646 (Md. 1992) (manufacturer must make reasonable efforts to warn of defect discovered after sale); *Comstock v. General Motors Corp.*, 99 N.W.2d 627, 634 (Mich. 1959) (duty to warn of defect that makes product hazardous to life if discovered shortly after sale); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 833 (Minn. 1988) (continuing duty to warn applies in "special cases"); *Feldman v. Lederle Labs.*, 479 A.2d 374, 389 (N.J. 1984) (manufacturer has duty to warn physicians of side

Several cases adopting the majority rule justify their holding on the principle that manufacturers should be held to the knowledge and skill of experts and must keep informed about the state-of-the-art as it relates to their products. *See Feldman*, 479 A.2d at 386-87; *Cover*, 461 N.E.2d at 871; *Koker*, 804 P.2d at 666-67. The Law Court recognized this principle in *Bernier*, 516 A.2d at 538, albeit in the context of a time-of-sale warning.⁶ Additionally, one majority-rule court reasoned that allowing manufacturers to ignore post-sale knowledge of dangers associated with their products is contrary to prevailing principles of negligence law. *Crowston*, 521 N.W.2d at 407.

The reasoning of courts adopting the minority position is unpersuasive. In *Estate of Kimmel*, 773 F. Supp. at 830-31, the court predicted that Virginia would not adopt a post-sale duty to warn because it had adopted section 388 of the *Restatement (Second) of Torts*. Section 388 imposes on suppliers a duty to exercise reasonable care to warn foreseeable users of reasonably knowable dangers. Yet, neither the text nor the comments to section 388 address the situation where a

effects discovered after sale of drug); *Cover v. Cohen*, 461 N.E.2d 864, 871 (N.Y. 1984) (extent of post-sale duty to warn is function of degree of danger and number of instances reported); *Smith v. Selco Prods., Inc.*, 385 S.E.2d 173, 176-77 (N.C. Ct. App. 1989) (duty to warn of dangers that manufacturer learns of after sale); *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 404 (N.D. 1994) (duty to take reasonable steps to warn foreseeable users of dangers discovered after sale); *Walton v. Avco Corp.*, 557 A.2d 372, 379 (Pa. Super. Ct. 1989) (helicopter manufacturer had duty to warn of defects in engine discovered after sale because unique nature of product and market facilitated communication of warning); *Koker v. Armstrong Cork, Inc.*, 804 P.2d 659, 666-67 (Wash. Ct. App. 1991) (upholding jury instruction that manufacturer had duty to warn of danger reasonably discoverable after sale).

I find only three jurisdictions rejecting a post-sale duty to warn: *Estate of Kimmel v. Clark Equip. Co.*, 773 F. Supp. 828, 831 (W.D. Va. 1991) (Va. law); *Carrizales v. Rheem Mfg. Co.*, 589 N.E.2d 569, 579 (Ill. App. Ct. 1991); *Dion v. Ford Motor Co.*, 804 S.W.2d 302, 310 (Tex. Ct. App. 1991) (no post-sale duty to warn unless manufacturer undertakes duty itself).

⁶ “A manufacturer is held to the knowledge and skill of an expert, and is required to test his products and keep abreast of scientific discoveries related to his products, but he has a duty to warn only of dangers that the employment of the reasonable foresight of an expert could reveal.” *Bernier*, 516 A.2d at 538.

manufacturer learns of a danger after it sells the product. In *Carrizales*, 589 N.E.2d at 579, the court reasoned that “[o]ur courts do not contemplate placing a duty on manufacturers to subsequently warn all foreseeable users of products by reason of a better design or construction not available at the time the product entered the stream of commerce.” This exaggerates the extent of a negligence-based post-sale duty to warn. The duty would not apply in all cases and to all users, but only to the extent that a reasonably prudent manufacturer would have provided a warning under the circumstances.

I find the majority position to be the better-reasoned view. As a matter of policy, a negligence-based post-sale duty to warn “accommodates society’s competing desires to provide product users with complete product information and yet to avoid placing unfair or unjustifiable burdens on manufacturers.” Victor E. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. Rev. 892, 896 (1983). Moreover, such a duty encourages manufacturers to “keep abreast of scientific discoveries related to [their] products.” *Bernier*, 516 A.2d at 538.

I predict that the Law Court would adopt a negligence-based post-sale duty to warn in product liability cases. Accordingly, under Maine negligence law when a manufacturer learns, or in the exercise of reasonable care should learn, of dangers associated with the foreseeable use of its products after they are manufactured and sold, it must take reasonable steps to warn foreseeable users about those dangers.

Given the practical problems associated with post-sale warnings, what is reasonable in the point-of-sale context need not be reasonable in the post-sale context. . . . [T]he facts of a particular case, such as the gravity and likelihood of harm, the number of persons affected, and the economic cost and practical problems associated with identifying and contacting current product users, should all be relevant in determining whether a manufacturer has satisfactorily discharged a post-sale duty to warn. Depending on the facts, something less than actual notice to every current product

user may be reasonable, and therefore sufficient, in the post-sale context.

Schwartz, *supra*, at 896 (footnote omitted); see John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 761 (1983) (manufacturer should have duty to use reasonable care to inform owners and users of dangers discovered post-sale, taking into consideration extent of danger involved and availability of means to identify and contact those who have possession of product).

I now apply this standard to the summary judgment record. At issue are Datapoint 8200 terminals with integrated keyboards manufactured as late as 1981, and Datapoint 8200 terminals with detachable keyboards manufactured as late as 1986. The plaintiffs' state-of-the-art experts, Karl H.E. Kroemer, Ph.D. and Stephen R. Zoloth, Ph.D., have compiled literature reviews relevant to a post-sale duty to warn.

In *Reviews of Publications Related to Keyboarding*, Plaintiffs' Designation of Experts Exh. III.C, Dr. Kroemer cites several articles that support a connection between cumulative trauma disorders ("CTDs") and keyboard use. A 1982 survey on visual display units ("VDUs") in the workplace found that constrained postures may be associated with physical impairment in the hands, arms, shoulders and neck, and that the incidence rate was reduced if operators could rest their hands and forearms. *Id.* at 46. A 1982 article notes a large number of overuse syndrome cases occurring in Australia as a result of keyboard work. *Id.* The author lists factors related to repetition injuries, including the number of movements, the load of force required, the amount of static muscle work and stressful posture. *Id.* at 46-47. A 1983 literature review focuses, in part, on repetitive motion injuries. *Id.* at 55. The author notes that repetitive motion patterns involved in keying have been associated with disorders by six authors, and recommends preventive measures including proper

hand and arm position, arm or hand rests, reduction of work repetitiveness and periodic rest breaks. *Id.* In response to a question concerning occupational typing and carpal tunnel syndrome (“CTS”) in the 1983 Journal of the American Medical Association, the author concludes that several studies “all point to repetitive wrist flexion as a contributory factor in the etiology of CTS.” *Id.* at 57. A 1984 publication discusses the risk of CTDs as a result of repetitive motion related to keyboard design, and recommends that users keep their wrists as straight as possible to avoid CTS and tendinitis. *Id.* at 63-64. A 1986 article states that compression of the carpal tunnel may damage the median nerve, one of the most serious problems that might occur in VDT use. *Id.* at 69. The article notes that sustained, extreme bending of the wrist may bring about a carpal tunnel problem, and that even “normal” typing posture involves ulnar deviation and thus increases the pressure in the carpal tunnel. *Id.* at 69-70.

In *Keyboard Operations and Musculoskeletal Disorders: A State of the Art Review*, Plaintiffs’ Designation of Experts Exh. I.E, Dr. Zoloth cites several articles supporting a connection between CTDs and keyboard use. In addition to several articles cited by Dr. Kroemer, Dr. Zoloth cites a study published by the National Institute for Occupational Safety and Health in 1990. *Id.* at 31. The study found that “symptoms consistent with upper extremity cumulative trauma disorders were associated with typing on computer keyboards,” and that the prevalence of symptoms increased as the typing speed or the percentage of time typing increased.⁷ *Id.* Additionally, Laura Punnett, Sc.D., testified that there was sufficient scientific evidence as of December 31, 1986 that manufacturers should have provided warnings to keyboard users. Deposition of Laura Punnett,

⁷ This study is not admissible to demonstrate a post-sale duty to warn plaintiff Bowen, because the record places the onset of her injuries sometime in 1988, before the study was published.

Sc.D., Exh. 7 to Defendant's S.J. Motion at 108.

A rational jury could conclude from this post-sale state-of-the-art evidence that the defendant knew or should have known of dangers associated with use of its keyboards, and that it had a post-sale duty to take reasonable steps to warn the plaintiffs, as foreseeable users, of those dangers. Accordingly, the defendant's motion for summary judgment is **GRANTED** on the plaintiffs' strict liability-based post-sale duty-to-warn claim, and **DENIED** on the plaintiffs' negligence-based post-sale duty to warn claim.

Dated at Portland, Maine this 19th day of January, 1996.

David M. Cohen
United States Magistrate Judge