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DID VIDEO GAMES TRAIN THE SCHOOL SHOOTERS TO KILL?:
DETERMINING WHETHER WISCONSIN COURTS SHOULD IMPOSE NEGLIGENCE OR STRICT LIABILITY IN A LAWSUIT AGAINST THE VIDEO GAME MANUFACTURERS

I. INTRODUCTION

A recent onslaught of school shootings in communities across the country has left more than eighty children and adults dead or injured.¹

A natural response to tragedies like the school shootings is to think it would never happen here. However, the Wisconsin-ite's illusion vanished on November 15, 1998, when school officials and police thwarted a plan by three high school boys to shoot classmates and teachers in Burlington, Wisconsin.² Instantaneously, West Paducah, Kentucky, and Littleton, Colorado, came a little closer to home. What if the Burlington plan had succeeded? What if a similar plan succeeds in the future? And what if, like in the Littleton and West Paducah shootings, the shooters had been influenced by violent video games such as "Duke Nukem," "Quake," and "Doom?"

Undoubtedly, as in Littleton and West Paducah, many would ask if


2. Tom Kertscher, Teen tied to shooting plot faces charges, MILW. J. SENTINEL, Dec. 2, 1999, at News 2. The plot was supposed to have been carried out on November 16, 1998. Id. Police stopped the boys the day before. Id. The three boys might "get their felony convictions reduced... or... expunged because they were prosecuted in Juvenile Court." Id. Their one year probation ended during the spring of 2000. Id.
the Video Game Manufacturer (VGM) could be held liable for the deaths and injuries. However, one must keep in mind the objectives society would like to achieve in holding the VGMs responsible—compensating the victims and deterring future injuries.\(^3\) Therefore, the question is not solely which legal remedy would be possible. Rather, the question is which legal remedy, if any, would best fulfill these objectives.

With these objectives in mind, this Comment attempts to identify the legal theory courts should adopt if a school shooting occurred in Wisconsin and it was later discovered that the shooters had extensively played violent video games.\(^4\)

Before addressing this issue, Part II will introduce the evidence and social theories behind the campaign against violent video games. First, it will examine some of the evidence in the West Paducah lawsuit, such as the methodology of the shooter. It will also look at the coincidence between the advent of these violent video games and the school shootings. Moreover, it will show that despite acknowledging that children should not play violent video games, the video game industry actually markets these same games to players under the age of seventeen. Second, it will explain the social theories of video game playing that experts have set forth, such as "operant conditioning," "stimulus addiction," "problem solving approaches," and "desensitization."

After laying the backdrop, this Comment will examine both theories of liability available to victims' families in Wisconsin—negligence and strict liability. In determining which would be most appropriate, this Comment will: (1) determine whether one theory is a better "fit" for VGMs under Wisconsin tort law; and then (2) examine whether one is more efficient in achieving our objectives.

3. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, 16-19 (1987). In his article analyzing product liability suits against all publishers, Professor Richard Ausness suggests that the only goal of tort law should be to compensate the victims. Richard C. Ausness, The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material, 52 FLA. L. REV. 603, 608 (2000). He further suggests that the incentives behind lawsuits against a media provider are either vindictiveness or political motivation. Id. at 668-69. However, is accident deterrence necessarily a bad political statement to make? Further, his evidence includes only statements by attorneys. Id. at 668. Even assuming that he is correct about the vindictiveness and political motivation, surely there are other ways, like ethical restraints and Rule 11 sanctions, to prevent these "selfish" motivations. It simply would not be good policy to preclude liability and thus, disregard compensation to victims by merely inferring that attorneys may have other incentives.

4. In Wisconsin, the victims' families can sue manufacturers under a theory of strict liability and/or negligence. Morden v. Cont'l AG, 611 N.W.2d 659, 673 (Wis. 2000) (citations omitted).
Part III will consider Wisconsin's law of negligence and discuss whether the VGMs have a duty, what constitutes a breach of that duty, what the causes of injury would be, and whether there are any policy considerations to bar liability. Part IV will do the same with Wisconsin's law of strict liability and estimate whether the video games at issue are "defective...[and] unreasonably dangerous." Through the analysis of Parts III and IV, the reader will see that neither theory has case law so "on point" as to give a clear indication of what will happen in a Wisconsin court.

Part V will use economic theory to determine whether the imposition of either strict liability or negligence would be efficient. In other words, which legal theory would best achieve society's two objectives in imposing liability upon the VGMs—compensation to the victim and deterrence of future accidents. Finally, Part VI will summarize the theories of VGM liability in accordance with Wisconsin law and will summarize the legal theory of efficiency. In the end, this Comment will show that Wisconsin courts probably should adopt the theory of strict liability when dealing with a lawsuit involving the VGMs.

II. THE CAMPAIGN AGAINST VGMs

A. Evidence

1. West Paducah, Kentucky

Attorney Jack Thompson, on behalf of the West Paducah victims' families, has filed suit against providers of information and entertainment, including VGMs Nintendo®, Sega® and Sony.


7. For instance, in the negligence section, this Comment analyzes lawsuits against a tire manufacturer and a gasoline cap manufacturer. See infra Part III.A.2.a. and Part III.A.2.b. In the strict liability section, this Comment analyzes a lawsuit against a pool manufacturer. See infra Part IV.A.


Thompson has alleged that point and shoot video games such as "Mortal Combat," "Doom," and "Quake" trained and inspired the fourteen-year-old West Paducah shooter to kill classmates at an early morning prayer meeting.

Thompson has characterized video games as "murder simulators," which train video game players to shoot and kill in real life. As proof for his statement and his lawsuit against the VGMs, he has pointed to the "methodology" of the West Paducah shooter. The fourteen-year-old entered his high school and from twenty-five feet, fired eight rounds in three seconds total, with all eight rounds hitting the shooter's intended target.

Thompson has equated this marksmanship with that of Lee Harvey Oswald. The young shooter had not fired a handgun before in his life. Yet, he "pulled the trigger, instantly moved to the next target, pulled the trigger again and moved to the next target." Marksman experts claim


12. Whittier, supra note 8. In these video games the player travels through mazes in "first-person perspective." Id. The player "shoot[s] human[s] and other targets." Id. With each kill, blood spatters onto the television screen. Id. Diane Schetky, a leading forensic pediatric psychiatrist, examined the West Paducah shooter and found that he "had been influenced by video games." CNN Talkback Live, Could Video Games Make it Easier for Kids to Kill? (CNN Television Broadcast, Apr. 30, 1999).

13. Id.; Ross, supra note 1. Video game playing has been a factor in 5 school shootings—Conyers, Georgia; Jonesboro, Arkansas; Littleton, Colorado; West Paducah, Kentucky; and Bethel, Alaska. See CNN Talkback Live, Does Cyber Violence Breed Violent Children? (CNN television broadcast, July 20, 2000).

14. See Ross, supra note 1.

15. CNN Talkback Live, Could Video Games Make it Easier for Kids to Kill?, supra note 12.

16. Id.

17. Id.; see also Ross, supra note 1. Along with the West Paducah shooter's amazing marksmanship, the two boys in the Jonesboro, Arkansas shooting "fired twenty-seven shots from a range of over 100 yards, and they hit fifteen people." Kyle Stephenson, Violence in Video Games, at http://www.college-term-papers.com (last visited Dec. 20, 2000).

18. CNN Talkback Live, Could Video Games Make it Easier for Kids to Kill, supra note 12; see also Ross, supra note 1. Five were head shots and three were upper-torso. Id. It is interesting to note that the shooter's favorite video games gave bonus points for head shots. Ausness, supra note 3 at 606-07 n. 10.

19. CNN Talkback Live, Could Video Games Make it Easier for Kids to Kill, supra note 12; see also Ross, supra note 1. Thompson qualified this statement by assuming that Oswald assassinated President John F. Kennedy. Id..

20. Ross, supra note 1.

21. CNN Talkback Live, Could Video Games Make it Easier for Kids to Kill, supra note 12.
that this is "off the scales" because inexperienced gun handlers usually unload a gun until a target hits the ground.23

In comparison, Thompson has pointed out the marksmanship of the New York City Police in the Amadou Diallo shooting.24 Unlike the West Paducah shooter, the policemen involved were trained gunmen.25 Nonetheless, from a closer distance, they fired forty-one shots with only nineteen hitting.26 Furthermore, these nineteen hits were scattered "all over Mr. Diallo's body." The West Paducah shooter, in contrast, fired eight shots and hit eight different people, in either the head or the torso.27

Thompson and other experts account for the school shooter's phenomenal marksmanship as the influence of violent video games.28

2. The Advent of Video Games

Many blame Hollywood and television violence, child neglect or abuse, violent books or violent music lyrics for the increase in juvenile violence.29 However, something does not ring true in placing the blame on these industries for the onslaught of school shootings within recent years. After all, the "Babyboomers" idolized violent media characters such as Davy Crockett and the Lone Ranger; child neglect and abuse is not a new social phenomenon; children have chanted and sung violent nursery rhymes for hundreds of years; and children have read and been read violent and disturbing fairy tales for centuries.30

22. Id.
23. Id.
25. Id.
26. Id.
27. Id: see supra note 18 and accompanying text (pointing out that the shooter's favorite video games gave bonus points for head shots).
29. CNN Talkback Live: Does Cyber Violence Breed Violent Children? supra note 13; see also CNN Talkback Live: Is Hollywood Marketing Sex and Violence to our Kids? (CNN television broadcast, Sep. 14, 2000); Ausness, supra note 3 at 605-06.
30. The following nursery rhymes are good examples: "Fee, Fie, Foh, Fum" in which a giant "smell[s] the blood of an Englishman," and whether "[b]e he alive or ... dead," the giant will "grind his bones to make [his] bread;" "Three Blind Mice" in which the farmer's wife morbidly cuts off the tails of the mice; the "Old Woman Who Lived in a Shoe" in which the mother whips her children before she sends them to bed; "Sticks and Stones" in which the child declares: "When I'm dead and in my grave, you'll be sorry for what you called me!" Nursery Rhymes, at http://www.collingsm.freeserve.co.uk/el (last visited Dec. 20, 2000).
Unlike these factors, video games are a recent influence on children. Video games first appeared in the 1970s, and actually became a true part of American adolescence during the 1980s. Moreover, the video games at issue—ones that are alarmingly true to life and include splattering blood whenever someone is shot or chainsawed—are even more recent. These video games appeared within the last decade and starkly contrast with video games of the early 1980s, which were inanimate and one-dimensional.

_Known Children's Tales_, at http://www.geocities.com:0080/Paris/LeftBank/6391/taking.html (last visited Dec. 20, 2000) (pointing out that in Grimms' Fairy Tales: "A woman, in a violent rage, pulls another woman's laces so tight that she suffocates"; a young girl is eaten by a wolf; parents abandon their son and daughter in the woods and upon attempting to find their parents, the children run into a witch who tries to roast them).

31. See Suzanne Choi, _Computer Games and Violence: A Child's Friend or Foe?,_ at http://www.acs.ucalgary.ca/~Edabrent/380/webproj/sue.html (last visited Sept. 21, 2000). Studies have shown that over eighty percent of American teenagers play video games. Id. It has been shown that a slight majority of these teenagers play more than six hours per week. Id.


32. This Comment is analyzing the liability of video game manufacturers in respect to today's violent video games. These violent video games advertise with slogans such as: "Let's get guns off the streets and into the hands of kids where they belong;" "Easier than killing babies with axes;" "Meet people from all over the world, then kill them;" and "More fun than shooting your neighbor's cat." CNN Talkback Live: _Is Hollywood Marketing Sex and Violence to our Kids?,_ supra note 29; Stephenson, supra note 17.

Also note that many of us, the author included, grew up playing video games. Many who criticize VGMs as a source of liability often argue this fact. However, early games included "Pong," an inanimate table tennis video game and "Space Invaders," the popular shooting game of Atari 5200. Space Invaders featured an inanimate yellow triangle that shot millimeter length lines to multi-colored figures resembling mushrooms and butterflies as they slowly lowered across the black screen. Compare this to what today's children are playing. A recent video game, "Quake," has the player act as a gunman from first person perspective. Hanson, supra note 31. "As [the gunman] advances . . . the weapons he uses grow more powerful and more gory—he trades in his shotgun for an automatic and later gets to use a chainsaw." Id. Further, in "Doom," another recent violent video game, the player gets to kill twenty to thirty people per minute. David Clements, _Video Violence too close to the real thing_ at http://www.media-awareness.ca/eng/med/class/teamedia/vidvonz.html (last visited Sep. 21, 2000).

3. Marketing to Children

In defense to being on the "hot seat" lately, the VGMs are quick to point out their self-imposed ratings system, which critics of the industry have admitted is "one of the most accurate rating systems now in use." This rating system was implemented by the Entertainment Software Ratings Board (ESRB)—an independent board of "retired school principals, parents, professionals, and other individuals from all walks of life." The ESRB reviews each video game's content and marks the outer packing of the video game with a black and white box surrounding a certain letter or pairing of letters. This letter, or pairing of letters, indicates the age group appropriate for playing that particular game. For example, "EC" stands for "Early Childhood," meaning that it is appropriate for players over the age of three; "E" stands for "Everyone" meaning that it is appropriate for players over the age of six; "T" stands for "Teen," meaning that it is appropriate for players over the age of thirteen; "M" stands for "Mature," meaning that it is appropriate for players over the age of seventeen; and "A" stands for "Adult," meaning that it is appropriate for players over the age of eighteen.

34. ESRB, at http://www.esrb.org (last visited Feb. 18, 2001) [hereinafter ESRB I]. Another argument posited by the VGMs is First Amendment protection. See Elliot I. Portnoy's discussion in Symposium, Corporate Citizenship: A Conversation Among the Law, Business and Academia, 84 MARQ. L. REV. 723, 753-72 (2001). This argument is beyond the scope of this Comment because it is another article in and of itself. However, Thompson is correct when he pointed out that the "[l]aw differentiates between adults and children... [and we] are not keeping adults from what they have a constitutional right to have, but from children what's harmful to them." CNN Talkback Live: Is Hollywood Marketing Sex and Violence to our Kids?, supra note 29. Further, he correctly argued that "[w]hen you commit fraud [by] market[ing] adult products to children, your First Amendment protection is gone." Id.

35. Gayle Tzemach, Violence Invades Video Games: Blood and Gore Onscreen, at http://archive.adbnews.go.com/sections/tech/DailyNews/internetgames981201.html (last visited Dec. 20, 2000). VGMs also point out that violent video games such as "Doom" and "Quake," make up only six percent of the games they release in one year. Hanson, supra note 31. While this may be true, it seems that this 6% is the "bread and butter of the industry." Id. For instance, one such video game made five million dollars in its first quarter on the market. Id. Furthermore, "Quake" sold more than 1.7 million copies in its first year on the market. Id.

36. ESRB, at http://www.esrb.org/about.asp (last visited Feb. 18, 2001) [hereinafter ESRB II].


38. ESRB II, supra note 36.

39. Id.

40. Id.
While these ratings may be accurate, critics argue that the VGMs actually undermine them by marketing the "Mature" video games to children. A recent government study has found that over seventy percent of "M" rated video games are marketed to children younger than age seventeen. This is not a surprisingly high statistic considering that "Duke Nukem" action figures are sold in toy stores, and ads for other video games can be found in *Sports Illustrated for Kids*. Further, an ad for "Time Crisis 2" specifically calls to children: "Let's get guns off the streets and into the hands of kids where they belong." Because of this marketing, concerned citizens such as Senator Joseph Lieberman have stated that VGMs "are obviously marketing to an audience that [they themselves] have said shouldn't be playing the game."

**B. Social Theories Behind Video Game Playing**

Many leading psychologists believe that violent video games allow impressionable children to participate in violence everyday. Furthermore, they see our children's exposure to violent video games as the answer to why such an explosion of juvenile violence has occurred recently. These psychologists attempt to prove their hypotheses through several theories such as (1) "operant conditioning," (2) "stimulus addition," (3) "problem solving approaches," and (4) "desensitization."

1. Operant Conditioning

Some experts refer to video games as a vehicle for "operant

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41. Tzemach, supra note 35. See also CNN Talkback Live: Is Hollywood Marketing Sex and Violence to our Kids?, supra note 29.
42. CNN Talkback Live: Is Hollywood Marketing Sex and Violence to our Kids?, supra note 29.
43. Tzemach, supra note 35.
44. CNN Talkback Live: Is Hollywood Marketing Sex and Violence to our Kids?, supra note 29.
45. Tzemach, supra note 35. Notably, Wisconsin's Senator Herb Kohl teamed up with Senator Lieberman on instigating this study. Id.
47. Id.
48. In his article, Professor Ausness implies that these theories can be discredited because the underlying studies do not represent realistic circumstances. Ausness, supra note 3 at 631-35. However, this argument raises some concern. Surely, Professor Ausness does not mean to suggest that all scientific research should be disregarded because the underlying data was received through laboratory experiments.
conditioning," in which behaviors are reinforced by a reward system.⁴⁹ For instance, when playing a video game, a player kills someone and is rewarded by receiving points and advancing to higher levels.⁵⁰ Because of this reward system, the video game player essentially becomes trained to do the very activity through which he receives that reward.⁵¹ In the case of violent video games, this involves causing harm to others.⁵²

2. Stimulus Addiction

Along with "operant conditioning," experts believe that video game playing leads to "stimulus addiction."⁵³ Studies show that there is an emotional response when playing video games, as opposed to merely watching television.⁵⁴ To attain the same emotional response to video games, a video game player craves an increasingly higher level of stimulation, which can be accomplished through more violence and more levels.⁵⁵

Perhaps the methodology of the Littleton shooters can be evidence for this theory. One observer has noted that the weapons used by the Littleton shooters—shotguns, bombs, rifles, pistols—are the same used in many of these controversial video games.⁵⁶ Moreover, another observer has pointed out that the Columbine massacre actually resembled a scene from the violent video game "Postal."⁵⁷ Arguably, the Littleton shooters, who extensively played these video games, needed an increase in stimulus to attain the same pleasure. After

⁴⁹. Whittier, supra note 8, at 14.
⁵⁰. Id. In a video game like "Doom," the player kills twenty to thirty people per minute. Clements, supra note 32.
⁵¹. Whittier, supra note 8, at 14.
⁵². Id.
⁵⁴. See Violent Video Games, supra note 53. In lumping video game manufacturers in with the same category as book publishers and movie producers, Professor Ausness seems to ignore this distinction. Ausness, supra note 3 at 603-06.
⁵⁵. See Ausness, supra note 3, at 603-06; Violent Video Games, supra note 53.
⁵⁷. Ausness, supra note 3, at 607; see also Stephenson, supra note 17 (pointing out that the Columbine shooters yelled as they shot their classmates and teachers and shot themselves in the head—the final scene in "Postal"). Apparently, "Postal" is a video game that includes a "postman that has gone crazy, and the object is to shoot anything that moves [including] parishioners leaving church [and] a high school band." Id.
realistic, violent video games, the next step (or "level" using video game talk) would be playing a real-life video game—setting bombs in a public setting, such as a school, and shooting any occupants.

As further evidence, perhaps VGMs have used this theory to their advantage. As mentioned in Part II, there is a sharp difference between video games of the 1980s and video games of today. While video games then had little animation and no developed plots, video games now have "extensive animation, and include a plot and defined characters." 

Admittedly, there has been an increase in technological sophistication over the last two decades. However, surely there is an underlying incentive in applying this sophistication to video games. Considering that it is very easy and extremely common to get hooked into playing "just one more time"—even with harmless games like computer Solitaire and Tetris—VGMs have to be aware of the addiction their video games create. Knowing this and knowing that violent video games bring in substantial revenue, arguably VGMs have intentionally perpetuated and fed these addictions through more violence and more life-like images.

3. Problem Solving Approaches

Another theory is that playing violent video games affects the approach children take when solving problems. Undoubtedly, something has changed recently to cause children to think that violence is the answer to either solving problems or alleviating frustration.

Indeed, studies do show that there is a difference between the problem solving approach taken by children who play violent video games as compared to children who play non-violent video games, such as Tetris and other puzzle or treasure-hunt games. Specifically,

58. See supra Part II.A.
59. Whittier, supra note 8, at 15.
60. Violent Video Games, supra note 53.
61. See Tzemach, supra note 35.
63. Violent Video Games, supra note 53.
64. Id.
researchers have noted that while non-violent video games teach players to solve problems using creativity and patience, violent video games teach players that "[t]he best way to solve a problem is to eliminate [it]." 65

When looking to recent school shootings, these studies do not seem wholly without foundation. Investigations of these shooters' lives have shown that these children were each dealing with adolescent problems such as peer pressure and dating issues. 66 If this theory is correct, it is not surprising that children, who allegedly learned to eliminate their problems through violent video games, opened fire upon their high schools where a great deal of these problems occur.

4. Desensitization

Inextricably intertwined with these previous theories is the idea that playing violent video games actually desensitizes players to killing and death in general. 67 According to Lieutenant Colonel David Grossman, a military psychologist, 68 and director of the Killology Institute 69 in Jonesboro, Arkansas, 70 the military has used video games to desensitize soldiers to killing for years. 71 Apparently, video games were introduced as a training tool because soldiers need to practice shooting at "realistic human images" to help them overcome mankind's "natural aversion to killing other humans." 72

For example, trained soldiers during World War II were reluctant to pull the trigger eighty-five percent of the time, even when faced with death. 73 However, after the military implemented video games in training, this reluctance dropped and the willingness to kill increased to

65. Id.
66. Whittier, supra note 8, at 11. The Conyers, Georgia shooter's girlfriend had recently broken up with him. Rivera Live, supra note 1. The Littleton shooters felt they were social outcasts and had adverse feelings towards "jocks." The Crier Report, supra note 56.
67. See Whittier, supra note 8, at 13-14.
69. "Killology" is a term created by Lt. Col. Grossman to describe the study of the methods and psychological effects of training people to kill. See Grossman, supra note 68.
70. See id; see CNN Talkback Live: Could Video Games Make it Easier for Kids to Kill?, supra note 12 (reporting that former President Clinton has stated that the United States should listen to Lt. Col. Grossman).
71. Id.
72. Whittier, supra note 8, at 13.
73. See CNN Talkback Live, Could Video Games Make it Easier for Kids to kill?, supra note 12.
above ninety-five percent.\textsuperscript{74} Alarmingly, one of the video games that decreases a soldier's hesitation to kill, "Doom," is sold to the public in a modified form.\textsuperscript{75}

\textbf{C. Conclusion}

With evidence (1) of the West Paducah shooter's amazing methodology, (2) that both the violent video games and the school shootings have recently occurred, (3) that VGMs are attempting to attract children to a product they admit children should not play, and (4) of the psychological theories, many people, who would like to hold VGMs responsible for any harm that results, now see a chance for a legal remedy.

The question becomes whether either or both theories of negligence and strict liability would be appropriate for a Wisconsin court to adopt in order to achieve societal objectives of compensation and deterrence.

\textbf{III. NEGLIGENCE IN WISCONSIN}

To prove negligence,\textsuperscript{76} the plaintiff must show the following elements: (1) there was "[a] duty of care on the part of the defendant;" (2) the defendant breached that duty; (3) the breach was a substantial factor in the plaintiff's injuries or damages; and (4) "an actual loss or damage [occurred] as a result of the injury."\textsuperscript{77}

\textbf{A. Duty, Breach, Substantial Factor}

1. The Law

In Wisconsin, each person has a duty to exercise due care.\textsuperscript{78} This is defined as not acting in any way which would "cause foreseeable harm to others even though the nature of that harm and the identity of the

\textsuperscript{74} Id.

\textsuperscript{75} See Whittier, \textit{supra} note 8, at 14.

\textsuperscript{76} For wrongful death suits in Wisconsin, the plaintiff must first prove the defendant's negligence. WIS. STAT. § 895.04(1) (1999).

\textsuperscript{77} Coffey v. City of Milwaukee, 247 N.W.2d 132, 135 (Wis. 1976) (citing Falk v. City of Whitewater, 221 N.W.2d 915, 916 (Wis. 1974) and Padilla v. Bydalek, 203 N.W.2d 15, 18 (Wis. 1973)). After the plaintiff proves negligence, he or she can then file a wrongful death action if she is a personal representative of the deceased. WIS. STAT. § 895.04(1). In Wisconsin, the person statutorily authorized to file this action is a "personal representative of the deceased." \textit{Id}. The last element, injury, will not be discussed in the main text. The injury is obvious—the injuries and deaths.

\textsuperscript{78} Morden v. Cont'l AG, 611 N.W.2d 659, 673-74 (Wis. 2000)
harm person or harmed interest is unknown at the time of the act."\textsuperscript{79} In other words, to be obligated to exercise ordinary care, the defendant needs only to perceive a foreseeable risk to "the world at large."\textsuperscript{80} Furthermore, when the defendant is a manufacturer, Wisconsin law expands this duty.\textsuperscript{81} The defendant-manufacturer must "anticipate [(1)] the environment\textsuperscript{n}\textsuperscript{82} surrounding the product's use, (2) all possible ways the product could be used and misused, and (3) any harm that may result.\textsuperscript{83}

The defendant-manufacturer breaches this duty when he or she acts or "omits a precaution" that someone with "ordinary intelligence and prudence" would foresee to cause "unreasonable risk of injury."\textsuperscript{84} Furthermore, Wisconsin courts use the reasonable person standard and determine whether that person would exercise the same degree of care "in the shoes of the defendant manufacturer."\textsuperscript{85} This "reasonable person" standard, while not dispositive, is measured against "customary methods of manufacture in a similar industry.\textsuperscript{n}\textsuperscript{86}

To prove cause-in-fact, the defendant's negligence need only be a "substantial factor in producing the plaintiff's injury."\textsuperscript{87} This analysis requires the court to look at the connection "between the design or

\textsuperscript{79} Id. at 673-74 (quoting Rockweit v. Senecal, 541 N.W.2d 742, 747 (Wis. 1995) (citing Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 102, (N.Y. 1928) (Andrews, J., dissenting) (internal quotations omitted)).

\textsuperscript{80} Antoniewicz v. Reszynski, 236 N.W.2d 1, 11 (Wis. 1975) (adopting Andrew's Minority opinion in Palsgraf, 162 N.E. at 99).

\textsuperscript{81} Morden, 611 N.W.2d at 674 (citations omitted); see also Coffey, 247 N.W.2d at 138; Klassa v. Milwaukee Gas Light Co., 77 N.W.2d 397, 401 (Wis. 1956).

\textsuperscript{82} Id; Morden, 611 N.W.2d at 674 (citations omitted);

\textsuperscript{83} Id; Morden, 611 N.W.2d at 674.\textsuperscript{n}

\textsuperscript{84} Id (quoting Tanner v. Shoupe, 596 N.W.2d 805, 812 (Wis. Ct. App. 1999) (quoting Kozlowski v. John E. Smith's Sons Co., 275 N.W.2d 915, 921 (Wis. 1979)) (internal quotations omitted).

\textsuperscript{85} Id; Tanner v. Shoupe, 596 N.W.2d at 812 (citing Schuh v. Fox River Tractor Co., 218 N.W.2d 279, 286 (Wis. 1974)).

\textsuperscript{86} Morden, 611 N.W.2d at 675 (quoting State v. Bodoh, 595 N.W.2d 330 (Wis. 1999) (quoting WIS-JI CRIM 1200) (internal quotations omitted)).

\textsuperscript{87} Sanem v. Home Ins. Co., 350 N.W.2d 89, 92 (Wis. 1984) (internal quotation omitted).
manufacture . . . and [the] injuries.\textsuperscript{88} Therefore, under Wisconsin law a defendant can be liable for negligence although there is more than one substantial factor and cause-in-fact.\textsuperscript{89} To illustrate, take the example of the two gunmen who shoot their respective guns at the same time, killing the same target.\textsuperscript{90} The question is which gunman is liable? Under the substantial factor test, the factfinder only needs to recognize that each gunman's negligence "substantially contributed" to the injury to find either gunman liable.\textsuperscript{91}

2. Case Law

\textit{a. Morden v. Continental AG}

In \textit{Morden v. Continental AG},\textsuperscript{92} the driver of a Volkswagen Vanagon was rendered a quadriplegic when, while driving on an interstate highway, both back tires blew out at the same time.\textsuperscript{93} The plaintiff subsequently sued the tire manufacturer under many theories of liability, including negligent manufacturing.\textsuperscript{94} At trial, tire experts testified that the tires blew out because the belts within the tires separated.\textsuperscript{95}

In its duty analysis, the court found that the tire manufacturer "knew or . . . should have known that the tires posed a foreseeable risk of injury."\textsuperscript{96} Experts at trial revealed that the tires were installed with "cap plies,"\textsuperscript{97} which apparently are not installed "unless [the tires] are likely to experience belt separation."\textsuperscript{98} The court found that because the tires were installed with a single cap ply design, the tire manufacturer "could have foreseen that a belt separation was possible."\textsuperscript{99} Furthermore, the

\textsuperscript{88} Morden, 611 N.W.2d at 676.

\textsuperscript{89} Hart v. State, 249 N.W.2d 810, 822 (Wis. 1977); Sampson v. Laskin, 224 N.W.2d 594, 598 (Wis. 1975); Blashaski v. Classified Risk Ins. Corp., 179 N.W.2d 924, 927 (Wis. 1970).

\textsuperscript{90} \textit{RESTATEMENT (SECOND) OF TORTS} § 876 (b) cmt. a, illus.3 (1979) explained in Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948).

\textsuperscript{91} This example, of course, ignores forensic science. \textit{See also} example of two people starting two separate fires at the same time that both burn down a house. Ausness, \textit{supra} note 3 at 632 n. 219.

\textsuperscript{92} 611 N.W.2d at 659.

\textsuperscript{93} Id. at 664.

\textsuperscript{94} Id.

\textsuperscript{95} Id. at 677.

\textsuperscript{96} Id. at 674.

\textsuperscript{97} Id.

\textsuperscript{98} Id.

\textsuperscript{99} Id.
court found it was foreseeable that if tires were likely to rupture, they would be more likely to rupture at high speeds.\textsuperscript{100}

The court also found that the tire manufacturer foresaw the misuse of the tires.\textsuperscript{101} The court was persuaded by statements in the manufacturer's 1988 Tire Guide.\textsuperscript{102} The guide gave information regarding the "correct tire size," "inflation pressure," and "proper load/inflation ratios... to assure satisfactory tire performance."\textsuperscript{103} These informational statements led the court to believe that the "manufacturer foresaw at least some types of consumer misuse."\textsuperscript{104}

Having found that the tire manufacturer owed a duty of care, the court then analyzed whether that duty was breached.\textsuperscript{105} Known technological findings in the industry indicated the danger related to belt separation.\textsuperscript{106} Because of this finding, a tire expert testified that the manufacturer should have taken the available precaution of using a double-wrap cap splice instead of merely a single.\textsuperscript{107} Consequently, the court found that the tire manufacturer should have chosen the double "design to prevent the harm caused by belt separation[,]"\textsuperscript{108} and, therefore, failed to exercise ordinary care.\textsuperscript{109}

After finding that the tire manufacturer had breached its duty in failing to use the double-wrap cap splice design,\textsuperscript{110} the \textit{Morden} court turned to the question of whether the breach was a substantial factor in causing the injuries.\textsuperscript{111} While the tire manufacturer argued that there were other causes to the injury such as "the age of the tires and their misuse,"\textsuperscript{112} the court found it was reasonable to find that the negligent manufacture of the tires was a substantial factor.\textsuperscript{113}

The court was persuaded by many facts produced at trial. First, the state trooper called to the scene of the accident stated that "[t]he failed
tires were the unique thing he saw in his investigation."¹¹⁴ Second, an expert at trial reconstructed the accident and testified that the belts in both failed tires had separated.¹¹⁵ Third, a tire expert testified that the separation was caused by a lack of adhesion, which could have been caused by dust during the manufacturing process.¹¹⁶ Finally, the court was especially convinced by the fact that both "tires were made in the same plant at the same time . . . were identical in design . . . [and] failed at the same time in exactly the same way."¹¹⁷

b. Keller v. Welles Department Store

In *Keller v. Welles Department Store,*¹¹⁸ a two-and-one-half year old child was severely burned when playing with a gasoline can.¹¹⁹ The can was filled with gasoline, which the child poured near a gas furnace and a hot water heater.¹²⁰ Consequently, the gasoline ignited.¹²¹

The parents brought suit for negligence.¹²² They claimed that the gasoline can had a cap that was "insufficient to prevent . . . children from removing it[,]"¹²³ and "the defendants knew or should have known that it would be dangerous when accessible to children."¹²⁴

In its duty analysis, the court found "it was foreseeable that failing to provide a child-proof cap for the gasoline can would cause harm to someone."¹²⁵ Supporting this finding, the court rationalized that children are very "curious about their environment" and often imitate adult activities.¹²⁶ Therefore, it is foreseeable that, with gasoline cans usually accessible to children,¹²⁷ children would attempt to either taste or pour gasoline.¹²⁸ "[S]ome harm" was thus, foreseeable.¹²⁹

¹¹⁴ Id. at 677.
¹¹⁵ Id.
¹¹⁶ Id.
¹¹⁷ Id.
¹¹⁹ Id. at 320.
¹²⁰ Id.
¹²¹ Id.
¹²² Id.
¹²³ Id. at 323.
¹²⁴ Id.
¹²⁵ Id. at 324.
¹²⁶ Id. The court asserted that children are fascinated by fire and adult activities include mowing the lawn and filling a car with gasoline. Id.
¹²⁷ Id. (stating that gasoline cans are commonly stored in garages "on the floor or on a low shelf").
¹²⁸ Id.
¹²⁹ Id.
3. Application to VGMs

In accordance with Wisconsin tort law, the first question is whether VGMs have a duty. Therefore, the plaintiffs need to establish that (1) the VGMs knew, or should have known, that video game playing by children "posed a foreseeable risk of injury," or (2) the VGMs could have foreseen dangers that might arise from excessive use of video games by children.

The *Morden* court found that, logically, the tire manufacturer could foresee an injury because they took measures to prevent it. A similar argument could be made in the case of VGMs. VGMs have implemented a ratings system, which indicates the video games that are appropriate for children. Consequently, it seems that VGMs can foresee harm resulting from children playing games such as "Duke Nukem," otherwise they would not be marked as "Mature."

Moreover, it seems that VGMs can foresee excessive use of their products. While there is no guide indicating this as in *Morden*, the *Keller* court has shown that foreseeability can be proven from common knowledge of child behavior. Like the *Keller* court pointing out that children are fascinated by fire and are likely to imitate adults, it is known that children do not voluntarily stop engaging in an activity that they enjoy. Accordingly, it is reasonable for a court to find that VGMs could foresee unsupervised children, like the *Keller* plaintiffs, misusing the product by playing a video game for a longer period of time than they should. Furthermore, like the *Keller* plaintiffs, it is known that children often play with things they are not allowed to. Therefore, a VGM should foresee that children would play video games that are not appropriate for their age.

129. Id. (emphasis omitted).
130. *Morden* v. Cont'l AG, 611 N.W.2d 659, 674 (Wis. 2000).
131. See id.
132. Id.
133. Id.
134. Tzemach, supra note 35.
135. Id.; see also the ordering information for "Duke Nukem: Time to Kill" showing that it is marked as "Mature," at http://www.us.playstation.com/product (last visited Feb. 18, 2001).
138. Id.
139. Id. at 320.
140. Id. at 323-24.
Assuming that a Wisconsin court is persuaded by the previous duty analysis, the next question becomes whether that duty was breached.\footnote{141} In \textit{Morden}, the tire manufacturer breached its duty because it knew the dangers of belt separation and did not use the best available precaution.\footnote{142} Arguably, unlike the tire manufacturer in \textit{Morden}, VGMs have used the best available precaution against children playing "Mature" video games by implementing a ratings system.\footnote{143}

However, as noted previously, VGMs are marketing these "Mature" video games to the same segment of the public they concede should not be playing them—children.\footnote{144} This would be like the \textit{Morden} tire manufacturer making some double-cap ply tires, but advertising that people should actually buy single-cap ply tires. Clearly, it would not be good policy for a court to hold that a manufacturer can preclude liability by merely implementing a precaution but at the same time undermining it in the quest for profit.

While duty and breach are the stepping stones to the negligence analysis, the question of liability essentially turns on whether the breach of duty was a substantial factor in causing the injury.\footnote{145} In the case of VGM negligence, the question is whether the marketing of violent video games to children is a substantial factor in the school shootings. Upon first glance, the marketing of video games to children seems quite distant from the school shootings. However, remember that the substantial factor test does not require the marketing of video games to be the most "immediate" nor "sole" factor.\footnote{146} The plaintiffs only have to prove that it was \textit{substantial}.

Arguably, there are other factors besides VGM negligence that contributed to these school shootings, such as parental neglect. Consequently, in applying the example of the two gunmen,\footnote{147} the VGM's negligence will be one bullet and parental neglect will be another. Therefore, to be a cause,\footnote{148} the VGM's "bullet" must "substantially contribute" to the injuries.

Assuming the experts are correct, and that the fact finder believes

\begin{itemize}
  \item \textit{Morden}, 611 N.W.2d at 675.
  \item \textit{Id.} at 675-76.
  \item Tzemach, \textit{supra} note 35.
  \item \textit{Id.}
  \item \textit{Morden}, 611 N.W.2d at 676.
  \item \textit{Id.}
  \item \textit{See supra} Part III.A.1.
  \item Using the word "cause" here is only for flow of prose. The term "substantial factor" here is overly convoluted.
\end{itemize}
them, this is not an overly unrealistic proposition. After all, the Morden court found the negligent manufacturing of the tires caused the belt separation resulting in the plaintiff's injury. The Morden court further found it was significant that both tires blew out at the same time and that the state trooper testified that the tires were the "unique" thing in his investigation of the accident.

Obviously, there can be no direct analogy in the case of VGM liability. However, it could be significant that in five of the recent school shootings, the shooters excessively played these violent video games. Furthermore, as in Morden, many experts have found the influence of violent video games to be the "unique" thing in these investigations.

Although the Morden court did not expressly cite the gunman example, it essentially found that of the many bullets, including misuse and age, the bullet of negligent manufacturing substantially contributed to the plaintiff's injury. Similarly, the other bullets of the school shooting, such as parental neglect and Internet pornography, do not preclude the VGM's bullet from being a substantial factor.

Regardless, one of the biggest obstacles to imposing negligence liability still awaits—proximate cause.

B. Proximate Cause

1. The Law

Wisconsin courts have the discretion to deny recovery if policy considerations demand them to do so. These policy considerations,
stated in the disjunctive, include whether:

(1) [t]he injury is too remote from the negligence, or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

These phrases seem quite arbitrary and ambiguous. Therefore, to determine whether any of these factors could preclude a finding of liability in the case of VGM negligence, one must closely examine case law and reveal the meanings of these phrases.

2. Case Law


In Beacon Bowl, Inc. v. Wisconsin Electric Power Co., a fire destroyed the restaurant, bar, and lanes of a local bowling alley. Apparently, untrimmed trees across the street from the Beacon Bowl touched the electrical lines, which caused a power outage and the subsequent fire. The plaintiffs claimed that the defendant "failed to inspect and trim [the] trees.

Upon finding that a reasonable jury could find that the defendant was negligent, the court considered the factors of proximate cause and did not preclude liability. The court found that imposing liability would not "place too unreasonable a burden" upon the defendant.

156. Sanem v. Home Ins. Co., 350 N.W.2d 89, 93 (Wis. 1984); Stewart, 271 N.W.2d at 88; Coffey v. Milwaukee, 247 N.W.2d 132, 140 (Wis. 1976); Haas, 179 N.W.2d at 888; Colla v. Mandella, 85 N.W.2d 345, 348 (Wis. 1957).
157. 501 N.W.2d 788 (Wis. 1993).
158. Id. at 793.
159. Id. at 794-95.
160. Id. at 795.
161. Id. at 796.
162. Id. at 797.
While the defendant argued that recovery would "require it to prevent all future voltage transients,"¹⁶³ the court decided that imposing liability would not increase the defendant's duty of care.¹⁶⁴ Consequently, because their duty would not increase, the imposition of liability would not "place too unreasonable a burden" upon the defendant.¹⁶⁵

The court also found that "imposing liability [would not] open the way for fraudulent claims."¹⁶⁶ Looking to the fact that the trial became a battle of the experts, the court rationalized that "[i]mposing liability . . . [would] not relieve future plaintiffs of the burden of proving cause."¹⁶⁷ For example, in the case of Beacon Bowl, the fire was easily explained.¹⁶⁸ The court believed that this may not be so in future cases.

b. Stewart v. Wulf

In Stewart v. Wulf,¹⁶⁹ the defendant left a loaded gun on a bed in an upstairs bedroom.¹⁷⁰ While visiting the defendant later the same day, the plaintiff observed the gun on the bed.¹⁷¹ Concerned with safety, the plaintiff picked it up and accidentally shot himself.¹⁷² After finding that the defendant was negligent, the Supreme Court of Wisconsin chose not to preclude liability.¹⁷³

The court decided that the injury was not "too remote" from the defendant's negligence.¹⁷⁴ In determining this, the court looked at considerations of time and location.¹⁷⁵ Specifically, the court noted that the injury was not "too remote" because the plaintiff's injury was sustained in the same location and on the same day of the defendant's negligence.¹⁷⁶

Furthermore, the court found that imposing liability on the defendant would not cause the court to "enter a field that has no

¹⁶³. Id.
¹⁶⁴. Id. at 797-98.
¹⁶⁵. Id.
¹⁶⁶. Id. at 798.
¹⁶⁷. Id.
¹⁶⁸. Id.
¹⁶⁹. 271 N.W.2d 79 (Wis. 1978).
¹⁷⁰. Id. at 81.
¹⁷¹. Id. at 81-82.
¹⁷². Id. at 82.
¹⁷³. Id. at 88-89.
¹⁷⁴. Id. at 88.
¹⁷⁵. Id.
¹⁷⁶. Id.
The court was persuaded that this case could be distinguished by the fact that the plaintiff's negligence could be found to be greater than the defendant's negligence. This fact would not be present in every situation.

c. Conroy v. Marquette University

In Conroy v. Marquette University, a student employee was given the duty of escorting an expelled student out of her dormitory room. Apparently, the expelled student showed delinquent tendencies and Conroy had not been informed of this. The next evening, the expelled student attacked Conroy outside of a neighborhood bar.

While finding that Marquette University was negligent, the court found that policy considerations precluded liability. The court found the injury was "too remote" from Marquette's negligence because the plaintiff's injury occurred off-campus thirty hours after the initial incident.

The court also held that they would be "enter[ing] a field that has no . . . just stopping point" if they imposed liability on Marquette University. In determining this, the court again pointed out that the attack occurred some time after and some distance away from the University's negligence. The court found that the attack was not within the University's control and, therefore, imposing liability would cause the court to "enter a field that has no sensible or just stopping point."

3. Application to VGMs

With Wisconsin case law as the backdrop, this Comment will now analyze each possibility of precluding VGM liability on policy grounds.

177. Id. (citation omitted).
178. Id.
179. 582 N.W.2d 126 (Wis. Ct. App. 1998).
180. Id. at 127-28.
181. Id.
182. Id.
183. Id. at 129.
184. Id. at 129-30.
185. Id. at 130.
186. Id.
187. Id.
188. The issues of whether an injury is "too wholly out of proportion" and "highly
a. "Too Remote"

Arguably, per Stewart and Conroy, a VGM's negligence in selling video games that train children to cause harm may be "too remote" in time and location from the school shootings. Unlike Stewart and similar to Conroy, the marketing and selling of video games and the subsequent training most likely occur off school premises while the injuries occurred on school premises. And while no one can be sure of the time frame between selling, training, and shooting, it seems clear that the time frame would be greater than the thirty hours in Conroy.

However, neither Conroy nor Stewart dealt with the negligence of a manufacturer. It goes without saying that the time between negligent manufacturing—or in this case, marketing—and an injury is going to be a lot longer than thirty hours. Moreover, the video game training itself occurs over a period of time. In a word, the VGMs have created a bomb with a very long fuse and, therefore, probably should not be excused from liability merely on this point.

b. "Unreasonable Burden"

To determine whether imposing liability would place an "unreasonable burden" on VGMs, the question becomes whether there would be a change in the VGM's duty. In Beacon Bowl, the defendant argued, and the court rejected, that imposing liability upon them would require it to undertake the impossible task of trimming every tree away from all of its lines. However, the Beacon Bowl court found that the defendant's duty was "to exercise reasonable care" which might indeed require the trimming of every such tree.

Therefore, as in Beacon Bowl, the court needs to find that any measures a VGM would take if liability were imposed would not change

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extraordinary" will not be analyzed. According to Beacon Bowl, these two factors essentially hinge upon whether the injury was foreseeable. 501 N.W.2d 788, 797-98 (Wis. 1993). These two factors are therefore, questions of fact—questions which can only be answered after a trial.

189. Stewart v. Wulf, 271 N.W.2d 79, 88-89 (Wis. 1978); Conroy, 582 N.W.2d at 129-30; Accord Beacon Bowl, 501 N.W.2d at 796 (holding that the injury was not "too remote" because the trees made contact with the electrical lines across the street from the Beacon Bowl).

190. Stewart, 271 N.W.2d at 88-89; Conroy, 582 N.W.2d at 129-30.

191. Conroy, 582 N.W.2d at 129-30.

192. Beacon Bowl, 501 N.W.2d at 797-98.

193. Id. at 798.

194. Id. at 797.
from the measures they were already required to take. For example, if the court found that after imposing liability, the VGMs would have to stop marketing to children and that this was the same duty VGMs had before liability was imposed, the court would most likely find that there would not be an "unreasonable burden" placed on the VGM.\textsuperscript{195}

c. "Fraudulent Claims"

Like in \textit{Beacon Bowl}, a case of VGM liability would likely result in a battle of experts.\textsuperscript{196} Therefore, a plaintiff would still have to prove her case. Consequently, under \textit{Beacon Bowl}, it does not seem that imposing liability on the VGMs would "open the way for fraudulent claims."\textsuperscript{197}

d. "No Sensible or Just Stopping Point"

Per \textit{Stewart} and \textit{Conroy}, a Wisconsin court may preclude liability because there would be "no sensible or just stopping point."\textsuperscript{198} In \textit{Stewart}, the court was persuaded by the fact that the plaintiff was also negligent.\textsuperscript{199} However, plaintiffs, such as the victims' families, are not negligent in either sending their child to school or allowing their parent or spouse to go to work.\textsuperscript{200} On the other hand, this might be a different conclusion if the plaintiffs were the parents of the school shooters who may be guilty of negligent supervision.

In \textit{Conroy}, the court precluded liability because the attack was beyond the control of Marquette University.\textsuperscript{201} Similarly, the amount of time a child actually plays the video game is beyond the VGM's control. In \textit{Conroy}, however, Marquette University did not train nor induce the expelled student to attack the plaintiff. To the contrary, in a case of VGM liability in a school shooting, this is probably the case. Assuming the experts are correct, the VGMs have instituted a vicarious boot camp through which children are trained to cause harm without consequence. This distinguishable fact could prevent a court from "enter[ing] a field in which there is no sensible or just stopping point."\textsuperscript{202}

\begin{itemize}
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{Id.} at 798.
\item \textsuperscript{197} \textit{Id.}
\item \textsuperscript{198} Stewart v. Wulf, 271 N.W.2d 79, 88-89 (Wis. 1979) (citations omitted); Conroy v. Marquette Univ., 582 N.W.2d 126, 129 (Wis. Ct. App. 1998).
\item \textsuperscript{199} \textit{Stewart}, 271 N.W. 2d at 88-89.
\item \textsuperscript{200} Both students and teachers are victims of the recent school shootings.
\item \textsuperscript{201} \textit{Conroy}, 582 N.W.2d at 129.
\item \textsuperscript{202} \textit{Id.} at 130.
\end{itemize}
C. Conclusion of Negligence

From the previous analysis, it is unclear whether negligence is the correct legal theory for Wisconsin courts to impose upon VGMs. While the lack of a case on all fours is not usually a great barrier to the imposition of negligence, a school shooting in which VGMs are sued for training the shooter is not a usual case. Therefore, a Wisconsin court must tread carefully. The question now becomes whether strict liability is a better recourse.

IV. STRICT LIABILITY IN WISCONSIN

A. The Law of Strict Liability in Wisconsin

In *Dippel v. Sciano*, the Supreme Court of Wisconsin adopted the concept of strict liability as set forth in the Second Restatement of Torts. Accordingly, to prove a claim of strict liability, a plaintiff must show that:

1. the product was in defective condition when it left the possession or control of the seller,
2. it was unreasonably dangerous to the user or consumer,
3. the defect was a cause (a substantial factor) of the plaintiff's injuries or damages,
4. the seller engaged in the business of selling..., and
5. the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.

Causation has already been discussed in the negligence section and there is no dispute over whether the VGMs were "engaged in the business of selling" video games or whether those video games had been "substantial[ly] change[d]." Therefore, of the foregoing factors, this

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203. 155 N.W.2d 55 (Wis. 1967).
204. Howes v. Hansen, 201 N.W.2d 825, 827 (Wis. 1972) (citations omitted).
205. Id. (quoting *Dippel*, 155 N.W.2d at 63).
206. See supra Part III.
207. *Howes*, 201 N.W.2d at 827.
208. Professor Ausness, in his article, suggests another issue—whether the video game is a "product" Ausness, *supra* note 3, at 621-25. Again, Professor Ausness has lumped video games in with other media sources such as books and movies. *Id.* He implies that the courts are reluctant to apply the "product" definition to words and pictures. *Id.* at 625. However, at the same time, he admits that a product is a tangible object that can be purchased—like a video game cartridge or disc. *Id.*
section will only look at whether a plaintiff could show that video games are (1) defective and (2) unreasonably dangerous.\textsuperscript{209}

1. "Defective"

Wisconsin case law has determined that there is no "general definition" of a defective condition.\textsuperscript{210} Rather, this finding "must be made on a case-by-case basis."\textsuperscript{211}

For instance, in one of Wisconsin's leading cases on strict liability, \textit{Vincer v. Esther Williams All-Aluminum Swimming Pool Co.},\textsuperscript{212} parents brought suit against a swimming pool manufacturer when their child fell into his grandparents' pool and suffered severe brain damage.\textsuperscript{213} They claimed that the pool was defective because it lacked a "self-latching and closing gate to prevent entry."\textsuperscript{214} However, the Wisconsin Supreme Court was persuaded by the fact that the pool included a retractable ladder.\textsuperscript{215} This ladder rendered the pool "as safe as it reasonably could be"\textsuperscript{216} and consequently, the court held that the pool was not defective.\textsuperscript{217}

Despite its initial finding that the pool was not defective and, therefore, precluded a holding of strict liability, the Court went on to analyze the second requirement of strict liability—whether the product was unreasonably dangerous.

In his analysis, he points to the conflict generated in the definition of product according to the Third Restatement of Torts. \textit{Id.} at 622, 630, 637. However, Wisconsin courts have based their entire strict liability analysis on the Second Restatement of Torts. \textit{Dippel}, 155 N.W.2d at 63. Because the Third Restatement is not binding, Wisconsin courts will most likely adhere to the Second Restatement's analysis and definitions.

Also, Professor Ausness suggests a policy reason for not including entertainment or information sources in the definition of product. Ausness, \textit{supra} note 3, at 663. For instance, he suggests that a cookbook could then be held liable for misinformation or errors in a recipe. \textit{Id.} Again, Professor Ausness seems to miss the obvious difference between video games and other sources such as books, movies, and aeronautical charts. Video games are not mere passive sources of entertainment. Clements, \textit{supra} note 32. Rather, video games are an interactive simulation of real-life murders. \textit{CNN Talkback Live: Could Video Games make it Easier for Kids to Kill?}, \textit{supra} note 12. Further, video games do not merely provide misinformation; they subconsciously train players to cause harm. \textit{Id.}

210. \textit{Id.} at 322 (citing Jagmin v. Simonds Abrasive Co., 211 N.W.2d 810, 813 (Wis. 1973)).
211. \textit{Id.}
212. 230 N.W.2d 794 (Wis. 1975).
213. \textit{Id.} at 794-95.
214. \textit{Id.} at 798.
215. \textit{Id.}
216. \textit{Id.}
217. \textit{Id.}
2. "Unreasonably Dangerous"

To be considered "unreasonably dangerous" in Wisconsin, the product must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Stated differently, the product's inherent danger cannot be "open and obvious" to the ordinary consumer or user.

In applying these principles, the Vincer court first noted that a "lack of a self-latching gate" was an obvious rather than a hidden condition. Second, the court pointed out that the average consumer would certainly know that this condition would be dangerous if an unsupervised child was left near the pool with the ladder down. Therefore, the "lack of a self-latching gate" was not unreasonably dangerous.

3. Application to VGMs

After looking at Vincer, the question now becomes whether VGMs could be held strictly liable. As stated previously, the determination of whether a product is in a defective condition is dependent upon the facts of each case. In Vincer, the court defined defective as being not "as safe as it reasonably could be." Therefore, per Vincer, video games such as "Doom" and "Quake" could be "defective" if a court finds that they are not as safe as they could be. A court could be persuaded by evidence that the difference between the Marines' version of "Doom" and the version made available to the public is not as great as it could be. For instance, it only costs about two hundred dollars to transform one version into another. Two hundred dollars is not a great expense to either the multi-million

218. Id. (citations omitted). Note that either the person who purchases the product or the person who merely uses the product can file a suit of strict liability. See Howes v. Hanson, 201 N.W.2d 825, 828 (Wis. 1972) (holding that an innocent bystander can bring a suit for strict liability).


220. Vincer, 230 N.W.2d at 799.

221. Id.

222. Id.

223. Keller v. Welles Dep't Store, 276 N.W.2d 319, 322 (citing Jagmin v. Simonds Abrasive Co., 211 N.W.2d 810, 813 (Wis. 1973)).

224. Vincer, 230 N.W.2d at 798.

225. Whittier, supra note 8, at 14.
dollar video game industry or the military defense budget. Furthermore, if the experts are correct, the same message is conveyed by both versions—to cause harm.

However, these factors are not dispositive. The average video game costs around fifty dollars. Therefore, to transform a fifty dollar video game for four times its price is quite expensive and could possibly illustrate that there is a substantial difference between the two versions.

As Vincer has shown, the video game must not only be defective but also "unreasonably dangerous." In other words, the video game's defect cannot be one anticipated by the "ordinary consumer" or user. As Senator Joseph Lieberman pointed out, many parents and adults do not realize the violence and inherent danger of certain video games, because they are called just that: "games." Moreover, these dangerous video games are marketed to children.

Therefore, it is reasonable to assume that the inherent defect of violent video games is not anticipated by an ordinary consumer. In comparison, if "Duke Nukem" or "Doom" were marketed as "murder simulators" discreetly to a certain segment of the public, then the inherent defect would probably be obvious to the average person.

B. Conclusion of Strict Liability

From the previous analysis, while the likelihood of success seems better with strict liability as compared to negligence, it is unclear whether strict liability is the appropriate legal theory for the Wisconsin courts to adopt. It still requires much fact finding and legal construction.

Therefore, after the negligence and strict liability analyses, no one can really be sure which legal theory would have a better chance of succeeding in a Wisconsin court. While this Comment has pointed out

226. Tzemach, supra note 35. The video game industry has made an excess of 10 billion dollars globally, with 5.3 million dollars made from American consumers alone. U.S. Children's Video Game Habits, at http://www.reseau-medias.ca/eng/issues/stats/usegame.html (last visited Sept. 21, 2000). Today, one in every ten American households has a Sony Playstation®, not to mention Sega® or Nintendo® systems. Id. In a recent year, over 150 million computer games were sold in the United States; this makes two games per American household. Hanson, supra note 31.

227. See the ordering information for various video games ranging from $19.99 to $49.99, supra note 135. For instance, "Duke Nukem: Time to Kill" costs $39.99. Id.

228. Vincer, 230 N.W.2d at 798.

229. Id.

230. Tzemach, supra note 35.

231. Id.; see also infra Part II.A.3. (noting that "Duke Nukem" action figures are sold in toy stores and there are ads in Sports Illustrated for Kids).
possible arguments on either side, no Wisconsin case is so "on point" as to give an indication of what a court would do. As a result, we cannot determine whether negligence or strict liability would effect our objectives of compensation and deterrence.

Nevertheless, there is still another, more objective, avenue to explore, such as the theory of legal efficiency. While the terminology may differ, the next section demonstrates that the theory of legal efficiency essentially shows which theory of liability would achieve our two societal objectives, irrespective of "fit" under Wisconsin tort law.

V. ECONOMIC ANALYSIS

In deference to the former Chief Justice of the Seventh Circuit, the Honorable Richard Posner, this Comment uses the Kaldor-Hicks method of efficiency in tort law. In other words, for tort law to be efficient, there must be wealth maximization. Accordingly, tort law must be applied in such a way that it minimizes the losses taken by both parties. There are two ways to create this result. The first is to minimize the cost of precaution. In other words, one needs to minimize the cost to each party in preventing an accident from occurring. The second is to minimize the activity level. Unfortunately, no matter how much precaution is taken, accidents will happen. However, if one minimizes the activity level associated with a product, undoubtedly the likelihood of an accident occurring at all would decrease. Therefore, in deciding whether to adopt negligence or strict liability, a Wisconsin court must determine which theory results in the maximization of wealth.

A. Minimization of the Costs of Precaution

In analyzing whether the costs of precaution are at the optimal

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232. LANDES & POSNER, supra note 3, at 16-19. Posner and Landes use the Kaldor-Hicks sense of efficiency rather than Pareto-Superior which means that efficiency is when "at least one person is made better off by the change and no one is made worse off." Id. In defending their rejection of Pareto-Superior and their adoption of Kaldor-Hicks, Posner and Landes point out that the Kaldor-Hicks sense of efficiency "is an ancient and honorable guide to social policy" because it was the basis upon "which Adam Smith urged repeal of the Corn laws." Id. at 17.

233. Id.

234. Id.

235. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (2d ed. 1997); Steven Shavell, Strict Liability Versus Negligence, 9 J. LEG. STUD. 1 (1980).

236. COOTER & ULEN, supra note 235, at 272.

237. Shavell, supra note 235 at 14.
minimization level, the focus is not necessarily on the price of the product. Rather, the focus is to what extent and from what incentive will the injurer-seller (injurer) and victim take precaution to prevent an accident from occurring.  

1. Strict Liability

In determining to what extent a victim will take precaution, it must be first assumed for the purpose of this analysis that the victim receives perfect compensation. Because she would be perfectly compensated, a victim would be placed in the same position she would be if the accident had not occurred at all. Moreover, if a victim would take precaution, she would only internalize that cost and receive no benefit. Therefore, between an accident with perfect compensation and no accident, the victim has no preference and has no incentive to take any precautions.

To the contrary, an injurer has every incentive to take efficient precaution. For example, if an accident would occur, an injurer would have to compensate the victim perfectly, regardless of whether the injurer acted with due care. Because injurers would be aware of this possibility, an injurer would "internalize ... the ... benefits of [any] precaution [taken]." As a result, the rule of strict liability would provide perfect compensation to the victim and induce the injurer to take efficient precaution.

2. Negligence

A common principle in the law of negligence is that an injurer can only be found negligent if he did not exercise the required "due care." In other words, if a court finds that the injurer exercised the required due care and the accident occurred anyway, the injurer would be precluded from liability. Consequently, an injurer has every incentive to create efficient precaution to the level of care that would preclude

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238. COOTER & ULEN, supra note 235 at 272.
239. Id. at 273-74.
240. Id.
241. Id.
242. Id.
243. Id.
244. Id.
245. Id.
246. Id. at 275-77.
247. Id. at 276-77.
liability in the case of an accident.\footnote{Id.}

Assuming an injurer does exercise due care and an accident occurs anyway, a victim would receive no compensation and, probably, would view the rule of negligence as if it were the same as no liability.\footnote{Id.} When a possible victim knows that there is no liability for an injurer in the case of an accident, and thus no possibility of perfect compensation, a victim would then take efficient precaution to prevent the injury from occurring at all.\footnote{Id.} As a result, the rule of negligence most likely would not provide perfect compensation to the victim, but it would give incentives to both the injurer and the victim to create efficient precaution.\footnote{Id.}

\textbf{B. Minimization of Activity Level}

In looking to which theory effects a minimization in activity level, this analysis essentially focuses on which theory results in a maximization of social welfare.\footnote{LANDES \& POSNER, supra note 3, at 54.} After all, this analysis is "assuming that the defendant's activity gives rise to a probability of the plaintiff's injury."\footnote{Id.} Logically, if a theory of tort law effects minimization of the level of activity, less accidents would occur.\footnote{Id.}

1. Strict Liability

As mentioned previously, unlike in negligence, the conduct of an injurer is irrelevant in the strict liability analysis.\footnote{Shavell, supra note 235. Shavell uses mathematical equations to prove his theories. These equations will not be included in this Comment. For the mathematical details, see id.} An injurer would then "choose the care level that minimizes production and precaution costs plus any accident losses."\footnote{Id.} In slightly less ambiguous terms, an injurer would know that in the probable event of an accident, it would be obligated to perfectly compensate the victim.\footnote{Id.} Consequently, it
would spread the costs of those accidents across its market base. In other words, it would increase the cost of the product relative to the projected cost of accidents. Under simple economic principles, when a product's price increases, fewer consumers purchase it. Because the price would increase by the projected amount of accident costs, the price would reach such a level that the purchasers of the product would only buy "the socially correct" output. As a result, the rule of strict liability would minimize the activity level.

2. Negligence

As noted earlier, under the law of negligence, an injurer can avoid liability altogether by exercising the required level of due care. Consequently, an injurer would not include accident costs in the price of the product. All it has to do is exercise the appropriate precaution to preclude having to pay those accident costs. Therefore, the price of the product would only include production and precaution costs and contrary to strict liability, the price of the product would not increase. Again, under basic economic principles, the price of the product would be "too low" and the output would be "too high." As a result, negligence would not minimize the activity level.

C. Application to VGMs

After seeing how wealth maximization can be achieved through the two theories of tort law, the analysis can now be applied to VGMs to determine whether a Wisconsin court should adopt negligence or strict liability.

As shown, if negligence is imposed, the VGM and plaintiff would both take efficient precaution to prevent the school shooting.
However, this only works when the plaintiff is in a position to take precaution. Keep in mind, this Comment assumes that the plaintiffs are the victims' families. Therefore, in the case of a school shooting, the plaintiff is not in a position to take any precaution—it was in the victims' best interests to go to school or to work. On the other hand, this result may be different if the plaintiffs were the parents of the shooters. Therefore, if a Wisconsin court would adopt negligence as the legal remedy, victims would not be compensated and the production and sale of violent video games would not decrease.

On the other hand, if strict liability were imposed, the VGMs would take precautions up to the point where it is more cost effective to prevent the accident than to pay for one. However, after that point, the VGM has to prepare for perfectly compensating the plaintiffs. In anticipation of paying these accident losses, the VGM would spread the cost among its consumer base—increasing the price of these violent video games. Because of this price increase, fewer consumers would purchase them. Therefore, fewer violent video games would be sold and the activity level would decrease. As a result of the activity level decrease, the number of school shootings and the accident costs would decrease.

Therefore, from an objective analysis based on efficiency, strict liability seems to be the better choice for Wisconsin courts to choose when faced with the liability of VGMs in a school shooting. It would achieve compensation to the victim and deter future accidents.

VI. CONCLUSION

Assuming Lt. Col. Grossman and the psychologists are correct, it is scary to know that impressionable, sometimes even disturbed, teenage Americans are being trained to cause harm whenever they play a violent video game. The question everyone is eager to know is: when that teenager acts in accordance with his training and decides to open fire upon his school, what legal remedies are available to the victims and their families? However, as this Comment has shown that is not the real question. The real question is what legal remedy would be appropriate.

271. Id.
272. See Shavell, supra note 235, at 3.
273. Id.
274. Id.
275. Id. at 14.
276. Id.
for a Wisconsin court to adopt to fulfill the objectives of compensating the victim and getting these games out of the hands of children.

As we have seen, this determination cannot be made solely on the basis of "fit" under Wisconsin tort law. Wisconsin's law of negligence demands that the plaintiff prove the VGMs were negligent and there are no policy considerations precluding liability. Wisconsin's law of strict liability demands that the plaintiff prove the video game was both defective and unreasonably dangerous. With both legal theories, Wisconsin case law indicates that each side has arguments for either imposing or precluding liability. Moreover, the success of either argument turns on the facts of each case and essentially rests upon whose experts the fact finder believes.

Therefore to decide which theory makes the most sense, a Wisconsin court must look at which theory is the most efficient. As the last section indicated, strict liability would be the most efficient remedy. The VGM would take the same precautions it would if negligence were imposed. Then, in the case of an accident, the VGM would pay all of the accident losses and the victim would be perfectly compensated. In anticipation of paying accident losses, the VGM would spread the costs to the consumer and increase the price of the product. Because of the price increase, fewer products would be purchased and fewer products would be played. Therefore, this would decrease the probability of school shootings from occurring.

Consequently, if a Wisconsin court needs to choose between which theory of liability to impose upon a VGM, the court should impose strict liability.

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