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INTRODUCTION

In Rhode Island, the existence of a legal duty in a negligence action is a pure question of law.[1] Therefore, establishing a duty in a negligence claim is essential to surviving pretrial dispositive motions.[2] The linchpin in establishing a duty is foreseeability.[3] In cases where a plaintiff, on a business's premises, is injured by a third party's criminal acts, the plaintiff can establish foreseeability by showing that similar criminal acts had occurred there before. Without prior similar criminal acts, it can be very difficult to

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1. Volpe v. Gallagher, 821 A.2d 699, 705 (R.I. 2003).

2. *See* Phelps v. Hebert, 93 A.3d 942, 946 (R.I. 2014) ("If the court finds that no duty exists, 'the trier of fact has nothing to consider and a motion for summary judgment must be granted.'") (internal quotation marks omitted); Gushlaw v. Milner, 42 A.3d 1245, 1252 (R.I. 2012) ("It is not until a legal duty is established that a plaintiff is entitled to a factual determination on the enduring elements of his or her negligence claim . . . ."); Benaski v. Weinberg, 899 A.2d 499, 502 (R.I. 2006) ("A fundamental principle of tort law, and a dispositive one based on the circumstances of this case, is that '[a] defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff.'" (quoting Lucier v. Impact Recreation, Ltd., 864 A.2d 635, 638 (R.I. 2005))). *But see* Kuzniar v. Keach, 709 A.2d 1050, 1055–56 (R.I. 1998) ("[I]t is still the function of the jury to determine the existence of those predicate facts that trigger the presence of the legal duty.").

3. Mu v. Omni Hotels Mgmt. Corp., 882 F.3d 1, 6 (1st Cir. 2018); *Volpe*, A.2d at 705.

establish foreseeability. As a general rule, a landowner does not have a duty to control criminal acts of third parties.[4] Consequently, plaintiffs alleging that a business has a duty to prevent criminal acts of third parties—without evidence of prior similar criminal acts—are often unable to prevail on pretrial dispositive motions and get their case before a jury. In *Mu v. Omni Hotels Management Corp.*, the First Circuit created a new avenue for plaintiffs to assert that a hotel has a duty to prevent foreseeable harm caused by the criminal acts of others.[5]

As a matter of first impression under Rhode Island law, the First Circuit, in its "Erie guess," held that a hotel had a legal duty to an invitee because the sequence of events leading to the invitee's injury made the harm foreseeable.[6] The "sequence of events" theory is a new method for plaintiffs to establish foreseeability in Rhode Island, thus triggering a business entity's legal duty to prevent harm.

Foreseeability is often the most difficult theory to prove in determining whether a defendant owes a duty to a plaintiff.[7] Foreseeability is defined differently in each jurisdiction, but is typically an amalgam of:

> [T]he multitude of factors, knowledge, hunches, instincts or what they may be called, the common sense that makes social intercourse possible, all operate to prompt the "ordinary reasonable man" that harms are "probable" or "natural" as normal results of certain situations and certain conduct. Where harm is to be anticipated, the problem of legal responsibility is raised.[8]

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4. Santana v. Rainbow Cleaners, Inc., 969 A.2d 653, 658 (R.I. 2009); Ferreira v. Strack, 636 A.2d 682, 686 (R.I. 1994).

5. *See* 882 F.3d at 13.

6. *Id.* at 3. In interpreting state law, federal courts must first consider any decisions of the state's highest court. When there is no state case law directly on point, the federal court must predict what a state's highest court would decide if it were to address the issue itself. This is called an "Erie guess." *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state").

7. E. L. Kellett, *Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 A.L.R.3d 619, § 11 ("One of the most difficult considerations in cases dealing with the subject covered in this note is the problem of foreseeability.").

8. Fowler Vincent Harper, *The Foreseeability Factor in the Law of Tort*, 7

Despite this seemingly inclusive definition, foreseeability can only be established in a negligence action in a limited number of ways.[9]

The recognition of a sequence of events theory to prove foreseeability eliminates a dangerous loophole under previous Rhode Island case law that allowed landowners to easily argue a lack of foreseeability when there had been no prior criminal activity. Whether harm resulting from a third party's criminal act was foreseeable has rested heavily upon the existence of prior criminal acts. Accordingly, absent skilled lawyering, business entity defendants were almost always relieved from liability for the first plaintiff's injury as a result of their breach of duty to prevent criminal acts of others.[10] This means that two identical plaintiffs who were harmed on the premises of the same business by two identical acts of the same third party, but at separate times, could obtain two different results for their negligence claims under Rhode Island law. The first injured plaintiff would be unable to establish foreseeability, while the second injured plaintiff would be able to show the existence of prior similar criminal acts to establish foreseeability. The second plaintiff would be able to put forth evidence that triggered a legal duty. The first plaintiff injured is in essence a sacrificial lamb, creating an evidentiary foundation for future injured parties to assert foreseeability through prior similar criminal activity.[11]

Part I of this Comment will explain the background and evolution of Rhode Island law on establishing foreseeability and a legal duty. Part II will explain the holding in *Mu* and the implications of the adoption of a sequence of events theory. Finally, Part III will argue that while the court in *Mu* held that the sequence of events that occurred established foreseeability, and thus a duty on a hotel corporation, the holding in *Mu* has broader applicability to business entities beyond hotels and innkeepers.

I. RHODE ISLAND LAW ON ESTABLISHING FORESEEABILITY AND A

NOTRE DAME L. REV. 468, 468 (1932).

9. *See id.*

10. *See generally Mu*, 882 F.3d at 1.

11. *See* Woods-Leber v. Hyatt Hotels of P.R., Inc., 124 F.3d 47, 51 (1st Cir. 1997) (finding it was not foreseeable that plaintiff would be attacked by a mongoose on defendant hotel's property when no other patrons had ever been bitten before on the property).

DUTY

"Rhode Island has not squarely addressed whether a business owner has a duty to protect its patrons from third-party criminal activity occurring on its premises."[12] Ordinarily in Rhode Island, no legal duty exists "to control a third party's conduct to prevent harm to another individual."[13] However, the courts carved out an exception to this rule. A defendant can have a legal duty to a plaintiff if the defendant has a "special relationship" with either the plaintiff or the third party whose conduct led to the harm.[14]

A. *The Role of a Special Relationship in Conferring a Duty on Defendants*

A "special relationship" flows from a defendant's status as a property owner.[15] Examples of special relationships include: a common carrier and its passengers; an innkeeper and its guests; a possessor of land held open to the public and members of the public; and a legal or voluntary custodian and its ward.[16] As the Restatement (Second) of Torts provides, "[a] special relationship . . . may arise between the possessor of land and those allowed on the land because of the possessor's power of control over those allowed to enter."[17]

Similarly, the Rhode Island Supreme Court has explained, a "possessor of land that holds the land open to the public/member of the public" is one type of special relationship that "giv[es] rise to a duty to aid or protect."[18] Given that holding land open to members

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12. 1 JOHN ELLIOTT LEIGHTON, LITIGATING PREMISES SECURITY CASES § 2:4 (Nov. 2018).

13. *Santana*, 969 A.2d at 658.

14. RESTATEMENT (SECOND) OF TORTS § 315 (AM. LAW INST. 1965)

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

15. *See* Martin v. Marciano, 871 A.2d 911, 915 (R.I. 2005); Volpe v. Gallagher, 821 A.2d 706 (R.I. 2003).

16. RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965).

17. *See Volpe*, 821 A.2d at 706 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 57, at 392 (5th ed.1984)).

18. Gushlaw v. Milner, 42 A.3d 1245, 1258 (R.I. 2012).

of the public is typically sufficient grounds for a special relationship, most businesses likely satisfy the requirements of a special relationship.[19] As such, most businesses have a duty to aid and/or protect in Rhode Island.[20]

B. *Ad Hoc Approach to Finding a Duty*

In addition to a special relationship, the Rhode Island Supreme Court has identified five other factors relevant to finding a duty.[21] While it is unclear if the existence of a special relationship is a precondition to examining the five factors, some courts have treated the finding of a special relationship as a precondition.[22] Other courts have analyzed the five factors and stated that the relationship between the parties "is likewise considered" in its duty analysis.[23]

Under Rhode Island case law, there is no "set formula for finding [a] legal duty," and thus "such a determination must be made on a case-by-case basis."[24] The court employs an "ad hoc approach" to determining whether a particular duty exists.[25] The five *Banks* factors considered in the ad hoc approach are:

> (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach.[26]

Among the ad hoc factors relevant to this analysis, foreseeability is the "linchpin in determining the existence of any duty."[27] As the linchpin, it can be inferred that foreseeability is intentionally identified as the first factor analyzed. Without

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19. Habershaw v. Michaels Stores, Inc., 42 A.3d 1273, 1276 (R.I. 2012) (citing Terry v. Cent. Auto Radiators, Inc., 732 A.2d 713, 716 (R.I. 1999)).
20. *See Gushlaw*, 42 A.3d at 1257.
21. Mu v. Omni Hotels Mgmt. Corp., 882 F.3d 1, 6 (1st Cir. 2018).
22. *Id.* at 6 n.3.
23. *Id.*; Selwyn v. Ward, 879 A.2d 882, 887 (R.I. 2005).
24. Flynn v. Nickerson Cmty. Ctr., 177 A.3d 468, 477 (R.I. 2018) (citing Wells v. Smith, 102 A.3d 650, 653 (R.I. 2014)).
25. *Mu*, 882 F.3d at 6.
26. Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1225 (R.I. 1987).
27. Splendorio v. Bilray Demolition Co., 682 A.2d 461, 466 (R.I. 1996).

foreseeability, it is extremely difficult, even if the other factors were in their favor, for a plaintiff to establish the defendant had a duty to protect the plaintiff from harm caused by third parties in Rhode Island. Not surprisingly, the issue of foreseeability is one of the most heavily litigated issues in negligence law. Additionally, foreseeability is discussed more than any of the other five factors in most of the opinions issued by Rhode Island courts.

In Rhode Island, "'the specific kind of harm need not be foreseeable as long as it was foreseeable that there would be harm from the act which constituted the negligence, provided it was foreseeable that there would be violence toward others.'"[28] An inquiry into a harm's foreseeability considers whether "'the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.'"[29] For example, in *Santana v. Rainbow Cleaners*, the Rhode Island Supreme Court considered only whether the injury to a third party was foreseeable by the defendant's failure to commit a third party to a mental hospital, not the specific assault suffered by the plaintiff.[30] Similarly, in *Gushlaw v. Milner*, the court considered whether a driver, by returning an intoxicated individual to his or her vehicle, would reasonably perceive the risk of injury to other drivers.[31] The court did not explore the specific harm to the plaintiff.[32]

C. *Foreseeability Without Evidence of Past Similar Occurrences*

Though plaintiffs only have to establish that harm was foreseeable, rather than the specific type of harm that occurred, plaintiffs still face challenges in establishing foreseeability in negligence actions. Defendants often argue that the lack of prior similar criminal acts renders a plaintiff's injury unforeseeable.[33] Historically, the inability to produce evidence of past similar criminal activity has served as the death knell to a plaintiff's

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28. Martin v. Marciano, 871 A.2d 911, 917 (R.I. 2005) (quoting Pollard v. Powers, 738 N.E.2d 1144, 1146 (Mass. App. Ct. 2000)).
29. *Id.* (quoting *Banks*, 522 A.2d at 1226–27).
30. 969 A.2d 653, 664 (R.I. 2009).
31. 42 A.3d 1245, 1261 (R.I. 2012).
32. *Id.*
33. *See* Mu v. Omni Hotels Mgmt. Corp., 882 F.3d 1, 8 (1st Cir. 2018); *see also* Volpe v. Gallagher, 821 A.2d 699, 716 (R.I. 2003).

foreseeability argument.[34] This is illustrated in *Thanadabouth v. Kongmany*, in which tenants were injured when a robber shot the plaintiffs and they sued the landlord for failure to maintain adequate security measures.[35] The Rhode Island Supreme Court, in deciding this case, held that a landlord owed no duty to a tenant to prevent crimes by third persons when there was no evidence of criminal activity on the premises prior to the robbery and shooting at issue.[36] The lack of prior criminal acts rendered the plaintiffs' harm unforeseeable and prevented any legal duty from being created.[37]

D. *The Intersection of Foreseeability and Public Policy in the Analysis of a Duty*

Even when there is evidence of prior similar criminal activity, it may be insufficient to establish foreseeability.[38] In certain circumstances, courts have found that important policy considerations warrant a deviation from past precedent.[39] In *Flynn v. Nickerson Community Center*, the plaintiffs brought a negligence action against the Nickerson Community Center after a juvenile stole a van from the defendant's premises and, while attempting to evade police, collided with the plaintiffs' vehicle and caused serious injury.[40] Even though the plaintiffs were able to put forth evidence that, on at least one occasion, a vehicle owned by another individual was stolen from the defendant's premises, the court declined to recognize a duty.[41]

In addition to the specific incident of past crime at Nickerson, the plaintiffs argued that, because the Nickerson Community Center is located in a high-crime area, the theft of a vehicle and subsequent accident was foreseeable harm.[42] Notwithstanding the prior vehicle theft, the Rhode Island Supreme Court found that the location of a defendant's property in a high-crime area was not a

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34. *See* Thanadabouth v. Kongmany, 712 A.2d 879 (R.I. 1998); *see also Volpe*, 821 A.2d at 699.
35. *Thanadabouth*, 712 A.2d at 879.
36. *Id.* at 880.
37. *Id.*
38. *See, e.g.*, Flynn v. Nickerson Cmty. Ctr., 177 A.3d 468 (R.I. 2018).
39. *See generally id.*
40. *Id.* at 471.
41. *Id.* at 472 n.3.
42. *Id.* at 480.

relevant factor in establishing foreseeability.[43] The court reasoned that there were important policy considerations against allowing proximity to a crime-ridden area to be a factor in a duty analysis.[44] Thus, the court rejected the plaintiffs' argument that Nickerson's location in a high-crime area was a basis for foreseeability.[45]

The Rhode Island Supreme Court has also been persuaded by policy considerations to benefit a plaintiff. In *Volpe v. Gallagher*, the court rejected what it described as the "who knew" defense asserted by the defendants.[46] The Rhode Island Supreme Court found that the defendants did owe a legal duty of care despite the absence of past violent behavior.[47] The policy considerations were so strong that they motivated the court to depart from the prior similar occurrences theory.[48]

In *Volpe*, a private landowner's adult son lived in her basement for the entirety of his life.[49] Even though he suffered from severe mental illness, his mother, the defendant, allowed him to store firearms and ammunition in her basement.[50] One afternoon, the defendant's son emerged from the basement and shot and killed his next-door neighbor.[51] The son had never used his firearms before this incident.[52] Making this holding even more remarkable is that it was unclear if the defendant's son shot his neighbor on the defendant's premises or the victim's premises.[53]

The Rhode Island Supreme Court stated, "we hold[] the absence of a violent past did not excuse defendant's conduct in failing to exercise control over her property to prevent such a mentally ill person from using her house as an ordnance depot."[54] Like *Flynn*, the court in *Volpe* stated that important policy considerations can impact the role of prior similar criminal activity

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43. *Id.*
44. *Id.* at 481. The court stated that this could "have the undesired consequence of 'the departure of businesses from urban core areas'" or if businesses remain, additional security measures could mean higher prices for the goods and services that customers need. *Id.* (internal citation omitted).
45. *Id.* at 480.
46. 821 A.2d 699, 710 (R.I. 2003).
47. *Id.*
48. *Id.*
49. *Id.* at 702.
50. *Id.*
51. *Id.* at 703.
52. *Id.* at 710
53. *Id.* at 703.
54. *Id.* at 710.

when establishing foreseeability.[55] The *Volpe* court reasoned that:

> a property owner allows a person who she knows is suffering from a delusionary and paranoid mental illness to use her property for the storage and maintenance of firearms and ammunition—despite realizing that this person has a history of talking to himself and to imaginary others; of harboring paranoid suspicions about other people; of not taking medication for his mental problems; and of not improving after receiving medical treatment for his mental illness—then that property owner is taking a foreseeable risk that a third party in close proximity of that dangerous activity will be hurt or killed.[56]

The court was not willing to sacrifice the duty owed to the plaintiff even though there was no evidence of past similar occurrences.[57]

II. *MU V. OMNI HOTEL MANAGEMENT CORPORATION*

With the previously stated evolution of foreseeability law in mind, the First Circuit, applying Rhode Island law, held for the first time that the sequence of events leading to an invitee's injury made the plaintiff's harm foreseeable and, therefore, conferred a legal duty on the defendant-hotel.[58] The sequence of events theory provides plaintiffs with an additional method for establishing foreseeability. Plaintiffs who are unable to establish foreseeability through prior similar criminal activity can still prevail under the sequence of events theory without having to argue for the application of the narrow public policy exception to impose a duty on the defendant.[59]

A. *Facts*

In *Mu v. Omni Hotels Management Corp.*, the plaintiff, Mr. Mu, lived in a condominium complex located on the premises of the defendant-hotel.[60] At 2:10 a.m. on a summer evening, the hotel received a complaint that "kids [were] smoking pot in the next

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55. *See generally id.* at 699; Flynn v. Nickerson Cmty. Ctr., 177 A.3d 468, 480 (R.I. 2018).
56. *Volpe*, 821 A.2d at 710.
57. *Id.* at 716.
58. Mu v. Omni Hotels Mgmt. Corp., 882 F.3d 1, 10 (1st Cir. 2018).
59. *See Volpe*, 821 A.2d at 721.
60. *Mu*, 882 F.3d at 3.

room" and being "very loud."[61] The hotel sent two hotel security guards to the room.[62] When they arrived, the security guards found twenty individuals inside the room and the registered hotel guest was not among them.[63] The security guards evicted the occupants and removed them from the hotel's premises.[64]

At this time, the hotel's valet observed the same group of individuals leave the lobby and walk down the street.[65] Shortly thereafter, the group reemerged near the hotel's driveway with a case of beer.[66] The valet observed the group "being rowdy" and engage in a fight on the sidewalk near the hotel.[67] The valet did not request hotel security or call the police.[68] After the fight ended, Mu came down to the hotel driveway to greet his girlfriend.[69] There, Mu observed the group coming in and out the hotel's lobby.[70] Mu then saw the group trying to engage in a fight with a man. After the man walked away from the hotel, the group continued to pursue him.[71] Mu instructed the valet to go get help, as he feared the group was violent.[72] The valet responded that it was not his problem, and then left to park a car.[73]

Scared for his own safety, Mu headed for the lobby.[74] As soon as Mu entered the lobby, he warned the hotel concierge that the group was outside.[75] The group then stormed in and Mu could hear them celebrating that they "just beat up some kid."[76] Mu requested that the concierge remove the group from the property and call the police.[77] In response, the group of individuals began to punch, shove, and hit Mu.[78] The assault culminated when two members

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61. *Id.*
62. *Id.*
63. *Id.* at 4.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* (internal quotation marks omitted).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* (internal quotation marks omitted).
77. *Id.*
78. *Id.*

of the group held Mu down while a third member of the group threw a table at him.[79]

Mu later filed a lawsuit alleging negligence against the hotel. The United States District Court for the District of Rhode Island concluded that the defendant did not have a duty to protect the plaintiff and dismissed the action.[80] The District Court reasoned that Mu presented no evidence the third parties committed prior similar criminal activity towards the plaintiff before the attack or prior criminal activity at the hotel generally.[81] Mu appealed the decision to First Circuit Court of Appeals.

B. *Special Relationship and Foreseeability Based on Sequence of Events Theory*

The parties in *Mu* conceded that the hotel and the plaintiff had a special relationship because the defendant-hotel was a "possessor of land that holds the land open to the public/member of the public," and the plaintiff was a member of the public.[82] Therefore, the relationship between Mu and the defendant-hotel lent support to Mu's argument that a duty existed. Next, the court analyzed the element of foreseeability, and turned to the first and most persuasive of the *Banks* factors to determine if a duty existed.[83] The plaintiff did not produce any evidence of prior criminal activity on the hotel's premises.[84] As such, defendant-hotel argued that the harm was not foreseeable and, therefore, the hotel had no duty.[85] The First Circuit rejected this argument.[86]

The court accepted Mu's argument that his harm was foreseeable because "'at least four of Omni's agents were aware of the group's violent and illegal conduct during the thirty-five minute period before the attack.'"[87] The First Circuit, persuaded by case law from other jurisdictions that have adopted a sequence of events theory, believed that the Rhode Island Supreme Court would rule

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79. *Id.*
80. *Id.* at 5.
81. *Id.* at 7.
82. *Id.*
83. *Id.* at 6; Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1225 (R.I. 1987).
84. *Mu*, 882 F.3d at 7.
85. *Id.*
86. *Id.*
87. *Id.* (internal quotation marks omitted).

the same way.[88] The court explained that it was foreseeable that the plaintiff would be harmed as a result of the group's criminal acts because the group was evicted by security for causing a disturbance; subsequently obtained beer; fought with each other; attacked a passerby; and were permitted to reenter the hotel lobby.[89] The First Circuit stated that its decision was "compatible with Rhode Island law," and recognized that Omni owed the plaintiff a duty.[90]

III. THE SEQUENCE OF EVENTS THEORY VERSUS THE PAST OCCURRENCES THEORY AND A HOTEL'S DUTY UNDER *MU*

The sequence of events theory adopted by the court in *Mu* allows a plaintiff to establish that harm is foreseeable when the particular sequence of events leading up to the harm made the harm foreseeable to the defendant.[91] The standard to establish foreseeability under a sequence of events theory seems to be objective, and does not require a plaintiff to prove his or her specific defendant foresaw harm.[92] Rather, the *Mu* court explained harm is foreseeable if "[a]n observer of this sequence of events would not be shocked to discover" the harm the plaintiff suffered.[93] As long as the four other ad hoc factors do not hedge against the finding of a duty, and the sequence of events is compelling, the plaintiff will likely be able to establish that the defendant owed a duty of care to prevent harm from the criminal acts of third parties.[94]

The plaintiff in *Mu* conceded his case would have failed under a "past occurrences" theory, but urged the court to recognize a sequence of events theory.[95] The hotel argued that Rhode Island should follow a past occurrences approach when establishing foreseeability.[96] Under a past occurrences approach, there is no bright line rule as to how many, or what type of, past similar

88. *Id.* at 7–8 (relying on Cotterhill v. Bafile, 865, P.2d 120, 122 (Ariz. Ct. App. 1993); Gould v. Taco Bell, 722 P.2d 511, 513–14 (Kan. 1986); Mills v. White Castle Sys., Inc., 421 N.W.2d 631, 632 (Mich. Ct. App. 1988).
89. *Mu*, 882 F.3d at 9.
90. *Id.* at 10.
91. *See id.* at 9–10.
92. *See id.* at 10.
93. *Id.*
94. *See id.* (citing *Cotterhill*, 865 P.2d at 122; *Gould*, 722 P.2d at 513–14; *Mills*, 421 N.W.2d at 632).
95. *Id.* at 9.
96. *Id.*

incidents is sufficient to establish foreseeability.[97] In jurisdictions that reject an ad hoc approach to finding that harm was foreseeable, as many as five prior incidents of assault were needed to sufficiently state a cause of action for third-party premises liability where the event that injured the plaintiff was assault.[98]

Under the sequence of events approach adopted in *Mu*, which looks more to the totality of the circumstances, evidence of past similar incidents can be used as a supplementary factor to be included in a foreseeability analysis.[99] But as evidenced in *Mu*, a successful assertion of the sequence of events theory eliminates the need for past similar incidents to establish foreseeability.[100] The *Mu* holding expands the tools available to plaintiffs who suffer injuries through the criminal acts of third parties, and bolsters their likely success in a negligence action with compelling facts.[101]

In Rhode Island, hotels and innkeepers must now be sensitive to hints and indications of violent behavior committed by third parties on their premises.[102] Hotels—like the Omni—in cases where harm is foreseeable, under the sequence of events theory, will have a duty to act reasonably to protect everyone on the premises from the criminal acts of third parties.[103]

Hotels may exercise reasonable care by maintaining adequate security measures, such as a security guard or video surveillance.[104] Hotels may be required to implement low-cost tactics, including restraining guests in the event that danger is

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97. 26 ERIC G. YOUNG, CAUSES OF ACTION 2d § 57 (2004, updated Oct. 2014). Practice guides advise attorneys that

> it seems unlikely that even the most conservative jurisdictions would find that a large number of prior incidents of murder or rape, for example, would be required before holding a business owner or proprietor liable for such crimes on its premises. However, the severity of the crime often results in less foreseeability on the part of the landholder.

Id. (citing Lopez v. McDonald's Corp., 238 Cal. Rptr. 436 (Cal. Dist. Ct. App. 1987)).

98. Foster v. Winston-Salem Joint Venture, 281 S.E.2d 36, 40 (N.C. 1981).

99. *See Mu*, 882 F.3d at 6–7.

100. *See id.* at 9–10.

101. *See id.* at 9.

102. *See id.* at 10.

103. *See id.*

104. Doug Donaldson, *12 Ways to Increase Hotel Security*, LODGING MAG. (Nov. 12, 2013), https://lodgingmagazine.com/ways-to-increase-hotel-security/2/ [https://perma.cc/4AG5-2VXE].

foreseeable and calling the police.[105] Factors to consider when determining the adequacy of security measures include industry standards, community crime rate, crime rate of similar business enterprises, the extent of criminal activity in the area, and the security concerns unique to that particular hotel.[106]

A. *The Site of the Negligence or the Site of the Injury*

Before *Mu*, Rhode Island courts had not squarely addressed whether a business owner or proprietor owes a duty to its patrons to protect against third-party criminal activity occurring on its premises. As such, many defendants have relied upon the holding in *Ferreira v. Strack*.[107] In *Ferreira*, the Rhode Island Supreme Court held that a landholder did not owe the plaintiff a duty to protect against criminal acts committed by third parties on adjacent property.[108] There, the plaintiff sued a church after she was struck by a car driven by an intoxicated driver as she was crossing a busy street following church services.[109] The court focused extensively on the fact that the injury occurred in an area outside of the church's control, so *Ferreira* provides little guidance in assessing a landholder's duty to protect patrons on its own premises.[110]

Clearly, the holding in *Ferreira* is limited to the site or location of the injury.[111] The holding in *Mu* suggests that the time may be ripe for an argument to expand the limited holding in *Ferreira*, as *Mu* appears to look to the location of the negligence rather than the location of the injury.[112] While the issue in *Mu* was limited to foreseeability and the existence of a legal duty, the expansive nature of the sequence of events approach has the power to shift the negligence analysis from a general premises liability action that is restricted to injuries occurring on the landowner's property, to an action in negligence for a failure to prevent off-premises injury.[113]

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105. 1 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY & LITIGATION 2d § 3:50 (2003).
106. *Id.* (citing Ellis v. Luxbury Hotels, Inc., 716 N.E.2d 359 (Ind. 1999)).
107. 636 A.2d 682 (R.I. 1994).
108. *Id.* at 689.
109. *Id.* at 684.
110. *Id.* at 686–87.
111. *Id.*
112. Mu v. Omni Hotels Mgmt. Corp., 882 F.3d 1, 7–8, 25 (1st Cir. 2018).
113. *See Ferreira*, 636 A.2d at 685 (stating that landowners are not liable for injuries caused by the criminal acts of third parties on adjacent property

Frequently, the sequence of events that led to the foreseeability of injury also reveals the defendant's negligence. For example, the sequence of events that led to the foreseeability of Mu's injuries could also be illustrative of Omni's inadequate security, poor staff training to handle incidents like rowdy guests and intruders, and lack of security protocol.[114] The failure of Omni's agent, the valet driver, to alert hotel security or the police indicates that guest safety was not a priority.[115] Further, the hotel's security cameras were not functioning, which rendered the security office unable to surveil the entrance and take preventative measures—such as sending personnel to protect hotel occupants, like Mu, when the third-party assailants returned.[116] Even if Mu had been injured on property adjacent to the hotel, Mu could point to these failures in the standard of care, and possibly succeed under a non-premises negligence theory (provided he was able to establish the other elements required in a negligence action.)[117]

Other jurisdictions have found a duty when the injury occurred off-premises. Weighing the sequence of events (referred to in Colorado as the "totality of the circumstances"), the Colorado Supreme Court found that a hotel owed a duty beyond its property line when the hotel evicted intoxicated guests and forced them to leave its property, and one of the guests was then injured in a drunk driving accident.[118] The hotel did not allow the guests to wait in the lobby for a cab and, despite knowledge of the group's intoxication, sent the individuals away in their vehicle.[119] Fifteen miles from the hotel, the intoxicated guests collided with another car.[120] The court found that the injury was foreseeable under the sequence of events theory and, therefore, the hotel owed a duty to

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under a premises liability theory); *see also Mu*, 882 F.3d at 7, 10.

114. *See generally Mu*, 882 F.3d 1.

115. *See id.* at 4.

116. *Id.* at 4–5.

117. *See* Volpe v. Gallagher, 821 A.2d 699, 704 (R.I. 2003) (finding a duty existed even though it was not clear if the injury occurred on the defendant's property or adjacent property not owned or maintained by the defendant); *see also* United States v. Stevens, 994 So. 2d 1062 (Fla. 2008) (finding a scientific laboratory owed a legal duty to the general public to prevent third parties from stealing hazardous substances).

118. Westin Operator, LLC v. Groh, 347 P.3d 606, 608 (Colo. 2015). It is important to note that this is not a dram shop case. The defendant did not supply or sell alcohol to any of the guests.

119. *Id.*

120. *Id.*

the intoxicated guests.[121] The court noted several alternatives that would have been more reasonable instead of evicting the guests and forcing them to their car, such as calling the police for assistance or calling a cab.[122]

Hotels and innkeepers in jurisdictions like Colorado and Rhode Island can no longer assume that a lack of prior similar incidents will shield them from liability when injury is foreseeable.[123] Hotels and innkeepers should also be aware that, as case law evolves around the country, they may be required to not only take steps to prevent injury on the premises, but also to prevent injury beyond the confines of their property.[124]

B. *Current Events and a Sequence of Events Leading to Foreseeability*

Current events, such as the shooting at the Harvest Music Festival in Las Vegas, the Parkland School in Florida, and the shooting that occurred at YouTube's headquarters in California, reveal that threats to personal safety are progressing.[125] A Federal Bureau of Investigation study found that nearly half of the 160 active-shooting incidents that occurred in the past decade took place in commercial settings.[126] When a person or group of individuals shows signs of excessive substance abuse or symptoms of mental illness that demonstrate a propensity for violence, like those that perpetrated many of the mass shootings, those charged with securing the safety of the premises must be on alert. Innkeepers, and other business entities that have a "special relationship" with those on their premises, are in the best position

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121. *Id.* at 616.
122. *Id.* at 614.
123. Mu v. Omni Hotels Mgmt. Corp., 882 F.3d 1, 9–10 (1st Cir. 2018).
124. *Westin*, 347 P.3d at 615–16.
125. *See* Enjoli Francis, *Security Failures in Parkland School Shooting Included Unlocked Doors, No PA System*, ABC NEWS (Dec. 29, 2018, 5:01 AM), https://abcnews.go.com/US/security-failures-parkland-school-shooting-included-unlocked-doors/story?id=60056864 [https://perma.cc/3H2Z-R9ED]; *see also* Tiffany Hsu & Jack Nicas, *Youtube Shooting Puts a Focus on Workplace Security*, N.Y. TIMES (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/technology/corporate-security-active-shooter-youtube.html [https://perma.cc/8PXF-JM9B]; Rhana Natour, *Are Hotels and Outdoor Concerts Any Safer Since the Las Vegas Attack?*, PBS (May 7, 2018, 4:49 PM), https://www.pbs.org/newshour/nation/are-hotels-and-outdoor-concerts-any-safer-since-the-las-vegas-attack [https://perma.cc/35QN-FYCW].
126. *See infra* section I.A.

to be alert and proactive about maintaining safety and security for guests.[127] Encouraging businesses to disrupt threats of violence and implement proper security training and protocol to combat these threats is in the best interest of the business entity and every individual that enters the premises. This is particularly true in the age of increased violence and mass shootings.[128]

In addition to putting forth general knowledge about the correlation between intoxication, mental illness, and violence through expert testimony and scientific journals that have documented the connection, plaintiffs can also elicit experiential observations by hospitality staff members in the vicinity about the link between substance abuse and violence.[129] Plaintiffs looking to focus on the foreseeability of the specific type of harm suffered may look to evidence showing the rate of violent incidences among intoxicated drinkers, the types of intoxicated drinkers who become violent, or the class of persons at risk of violent harm from a visibly intoxicated person.[130] Similar data may be utilized to show the correlation between mental illness and violence.

Recognizing foreseeability through the use of a sequence of events will incentivize businesses to employ best safety practices (in an effort to avoid litigation) that, in turn, keep the community safer. With mental health awareness on the rise, access to information regarding how to identify symptoms of substance abuse and mental illness, and how to respond to those symptoms, is easier than ever to obtain.[131] This is important because mental illness and substance abuse are two potential indicators of violence.[132] As with the young and rowdy crowd in *Mu*, many of the perpetrators of crime, who become the subject of personal injury cases, show signs of aggression or indications that they will cause violence

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127. *See infra* section I.A.

128. *See, e.g.*, Press Release, ASIS Int'l and Soc'y for Human Res. Mgmt., ASIS International and SHRM Release American National Standard on Workplace Violence Prevention and Intervention (Oct. 20, 2011), https://www.ansi.org/news_publications/news_story?articleid=1e68ec70-ef1e-4fbe-a092-f1750a61643f [https://perma.cc/MFH6-7W3H].

129. *See* Piazza v. Kellim, 377 P.3d 492, 503 (Or. 2016).

130. *Id.*

131. *See, e.g.*, *Mental Health First Aid*, NAT'L COUNCIL FOR BEHAV. HEALTH, https://www.thenationalcouncil.org/about/mental-health-first-aid/ [https://perma.cc/A23S-5ZYY] (last visited Feb. 27, 2019).

132. *Id.*

before they commit any acts of violence.[133] Business entities—especially hotels—should be ready to fulfill their duty to act reasonably to protect guests from the criminal acts of third parties when behavioral patterns indicate a propensity for crime or violence.

In many cases, the burden on a hotel will be little more than common-sense preventative measures, such as calling local police.[134] A study comparing averted acts of violence to those that actually occurred highlighted that simple measures, such as reporting threats of violence as soon as they appear and implementing employee safety training, were differentiators in averting violence.[135] Requiring businesses to develop a more keen and attentive sensitivity to events as they unfold should mitigate injuries committed by third parties and would keep negligence law contemporary with the ever-evolving world.

C. *Hotels, Innkeepers, and Beyond*

Though not yet formally adopted by the state courts in Rhode Island, the *Mu* case, combined with case law from other states, will arguably have broad applicability on all business-entity defendants.[136] The holding in *Mu* was specific to a hotel defendant, but a majority of businesses invite members of the public onto their premises and will now likely have a duty to prevent invitees from the foreseeable criminal acts of third parties in Rhode Island.[137]

Courts in other states have adopted a sequence of events theory to establish foreseeability that a third party would commit crime on a business entity's property.[138] The foreseeability of a third party's

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133. *See generally* Doe v. St. Michael's Med. Ctr., 445 A.2d 40 (N.J. Super. Ct. App. Div. 1982); Jeanne Sahadi, *How Common Is Workplace Violence?*, CNN MONEY, https://money.cnn.com/2015/08/26/news/workplace-violence-virginia-shooting [https://perma.cc/U64L-VGEY] (last visited Feb. 24, 2019).

134. *See* Shayna Balch, *Workplace Violence: 5 Ways to Keep Your Employees Safe*, PHX. BUS. J., https://www.bizjournals.com/phoenix/blog/business/2015/01/workplace-violence-5-steps-to-keep-your-employees.html (last visited Feb. 24, 2019).

135. Dean Esserman, *The School Shootings that Don't Happen*, NAT'L POLICE FOUND., https://www.policefoundation.org/the-school-shootings-that-dont-happen/ [https://perma.cc/Y6K8-WJ32] (last visited Feb. 24, 2019).

136. *See generally* Mu v. Omni Hotels Mgmt. Corp., 882 F.3d 1 (1st Cir. 2018).

137. *See generally id.*

138. *See* Gould v. Taco Bell, 722 P.2d 511 (Kan. 1986); Cotterhill v. Bafile, 865 P.2d 120 (Ariz. Ct. App. 1993); Mills v. White Castle Sys. Inc., 421 N.W.2d

crime(s) against another has led to the finding of a duty for restaurants and tavern owners.[139] In these cases, the third parties responsible for the plaintiffs' injuries exhibited signs of violence and the business-entity defendant's agents neglected to partake in simple and reasonable action to protect patrons.[140]

1. Innkeepers, Tavern Owners, and Restaurants

State courts in Kansas have long recognized that

> "A proprietor of an inn, hotel, restaurant, or similar establishment is liable for an assault upon a guest or patron by another guest, patron, or third person where he has reason to anticipate such assault, and fails to exercise reasonable care under the circumstances to prevent the assault or interfere with its execution."[141]

In *Gould v. Taco Bell*, the plaintiff was verbally assaulted by another patron of the restaurant as the manager watched.[142] The patron then physically attacked the plaintiff inside the restaurant, and again in the parking lot.[143] The manager failed to respond to pleas to call the police while the plaintiff was inside the restaurant, and only contacted police after the violence spilled into the parking lot.[144] The Supreme Court of Kansas found the sequence of conduct by the patron, observed by the manager, made the plaintiff's harm foreseeable.[145] The plaintiff was awarded punitive damages in an effort to "to punish the [restaurant] for malicious, vindictive or willful and wanton invasion of the injured party's rights" by failing to intervene or warn the plaintiff of the danger posed by the third party.[146]

Tavern owners have also been found liable for the foreseeable

631 (Mich. Ct. App. 1988).

139. *See Gould*, 722 P.2d at 511; *Cotterhill*, 865 P.2d at 120; *Mills*, 421 N.W.2d at 631.

140. *See Gould*, 722 P.2d at 511; *Cotterhill*, 865 P.2d at 120; *Mills*, 421 N.W.2d at 631.

141. Kimple v. Foster, 469 P.2d 281, 283 (Kan. 1970) (internal quotation marks omitted).

142. *Gould*, 722 P.2d at 514.

143. *Id.*

144. *Id.*

145. *Id.* at 518.

146. *Id.* at 517.

criminal acts of third parties.[147] In *Cotterhill v. Bafile*, the Arizona Court of Appeals overturned the trial court's judgment notwithstanding the verdict in favor of the defendant and ordered a new trial to determine the defendant's liability for an assault that occurred at the bar he owned.[148] The court emphasized that "bad feelings" between the plaintiff and the third parties "persisted for 10 to 15 minutes, including loud and hostile verbal exchanges among several men," and despite this, the bartender "did not attempt to calm the situation, ask anyone to leave, threaten to call the police[,] or call the police during that time."[149] The court found that the sequence of events, that albeit unfolded over only ten to fifteen minutes, could lead a reasonable jury to find the fight was foreseeable and therefore convey a duty upon the tavern owner.[150]

2. Other Entities

While restaurants and taverns may logically go with hotels and innkeepers, courts have also recognized a sequence of events theory to establish the foreseeability of criminal acts to create a duty between a school district and the victim of a criminal act committed by a student of the district.[151] In *N.L. v. Bethel School District*, a high school student of the school district raped another student of the school when the student convinced the victim to skip track practice under the guise of getting lunch.[152] The student who raped the younger victim was a convicted sex offender, and the school's principal had been informed of the student's status.[153] In addition to being a registered sex offender, the student had been a source on ongoing disruptions and had committed various serious disciplinary infractions at the school leading up to the rape.[154] Despite these alarming facts, the principal failed to notify other school employees of the student's status as a registered sex offender or implement a safety plan to protect other students.[155] Furthermore, the student was permitted to act as a student-mentor

147. *See generally* Cotterhill v. Bafile, 865 P.2d 120 (Ariz. Ct. App. 1993).
148. *Id.* at 121.
149. *Id.* at 122.
150. *Id.* at 122.
151. N.L. v. Bethel Sch. Dist., 378 P.3d 162, 164 (Wash. 2016).
152. *Id.* at 164.
153. *Id.* at 164–65.
154. *Id.* at 164.
155. *Id.* at 165.

for younger students on the track team.[156] The court found that the sequence of events leading up to the victim's rape made her harm foreseeable and the inaction of the school district, the principal, and other agents of the district amounted to a breach of the duty of care owed to the victim.[157]

The recognition of a sequence of events to establish foreseeability can have impact on all defendants found to have a special relationship with a defendant, even those that are less obvious such as schools.

CONCLUSION

The recognition of a sequence of events theory to establish the foreseeability of a plaintiff's harm is a necessary expansion of current negligence law in Rhode Island because it permits a court to consider the totality of the circumstances when contemplating foreseeability, and eliminates the ability of a culpable defendant to evade liability when the plaintiff is unable to produce evidence of prior criminal acts or strong policy considerations. Further, it raises the bar for businesses to be aware of, and reactive towards, threats of criminal activity on their property. While the holding in *Mu* was narrow and addressed only the duty owed by a hotel, the reasoning applied by the First Circuit has the potential for broad applicability encompassing all business (and quasi-business) entity-defendants that invite members of the public onto their property.

156. *Id.* at 164.
157. *Id.* at 170.