

Distinguishing Between an Apology and an Admission:
Nunes v. Duffy and the Benevolent Gesture Statute
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A client's post-accident admission of liability can create insurmountable obstacles even in cases where liability is weak. Whether to diffuse a distressful situation, placate an excitable party, or out of a general sense of wrongdoing, the reasoning behind a client's admission of liability may be less important than the admission itself. What if the client expresses sympathy to the injured party? When does a party's statement, writing, or gesture of sympathy become an admissible statement of liability? And what if the admission of liability is made contemporaneously with an expression of sympathy? The Massachusetts Appeals Court recently addressed this issue and the scope of the benevolent gesture statute, GEN. LAW C. 233 S. 23D, in *Nunes v. Duffy*, 101 Mass. App. Ct. 460 (2022).

(a) Statute

In 1986, Massachusetts became the first state to enact a benevolent gesture statute, excluding from evidence post-accident statements, writings, or gestures of sympathy. The statute was inspired by a family tragedy involving a former state senator, William L. Saltonstall, whose daughter, Claire, was struck and killed while riding her bike. *See* Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135 at FN 82 (2002). The offender never expressed contrition because he feared potential legal consequences. As a result, Massachusetts passed what is referred to as the benevolent gesture statute, GEN. LAW C. 233 S. 23D.

The statute provides:

Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. GEN. LAW C. 233 §23D.

Since the enactment of GEN. LAW C. 233 §23D, other states have followed with their own iterations. The Massachusetts legislature has even enacted a broader statute applying to medical malpractice actions. Gen. Law c. 233 §79L. Until *Nunes*, however, the Appeals Court never addressed the applicability of §23D as it relates to contemporaneous statements of both fault and sympathy.

(b) Nunes v. Duffy, 101 Mass. App. Ct. 460 (2022)

The *Nunes* case arose when the plaintiff's motorcycle struck the defendant's Jeep. *Nunes v. Duffy*, 101 Mass. App. Ct. 460, 461. At the time of the incident, the defendant was attempting a left turn into a northbound lane of traffic. *Id.* The codefendants had parked two trucks in the southbound lane, obstructing the defendant's view. *Id.* The defendant slowly proceeded to take her turn but remained in the southbound lane. *Id.* The plaintiff, a motorcycle driver in the southbound lane, struck the defendant's vehicle and sustained serious injuries. *Id.*

The defendant exited her vehicle and approached the plaintiff, who was on the ground. *Id.* What occurred next was disputed: the plaintiff claims that the defendant repeated, “I’m so sorry. It was all my fault” three times. *Id.* The defendant did not recall that statement, testifying instead that she asked the plaintiff if he was all right and then said, “I didn’t see you coming.” *Id.* The trial court, relying on the benevolent gesture statute, excluded the statement, “It was all my fault. I’m sorry,” but allowed the defendant’s subsequent admission that she didn’t see the plaintiff. *Id.* at 461-462.

After a defense verdict the plaintiff appealed, arguing that he was prejudiced by the exclusion of the entire statement, “It was all my fault. I’m sorry.” *Id.* at 460-461. In a case of first impression, the Appeals Court agreed and held that the trial court should have distinguished between the statement pertaining to liability and the statement expressing sympathy. *Id.* at 463. Applying this distinction, the statement, “It was all my fault” was admissible while the statement “I’m so sorry” was not. *Id.* at 464. Since the exclusion of the admission pertaining to liability was prejudicial, judgment for the defendant was vacated and the case remanded. *Id.* at 465.

(c) Practical Considerations following Nunes

The *Nunes* decision provides some guidance to practitioners in analyzing the admissibility of a client’s post-incident statement, writing, or gesture outside of the medical malpractice context. The prudent practitioner must first determine whether: (1) it is a statement, writing or benevolent gesture as defined by the statute; and (2) whether it was directed to the injured party or family member. The analysis is simplified when it involves a statement or writing, but it becomes more complicated when determining whether a client’s actions can be characterized as a “gesture” protected by the statute. The statute expressly defines “benevolent gesture” as “actions which convey a sense of compassion or commiseration emanating from humane impulses.” *Id.* A purchase of flowers sent to an injured party, or attendance at a memorial service, would conceivably be a “benevolent gesture” excluded by the statute, even if they are admissible for other purposes. Importantly, in the social media age, an instant message or post to an injury party’s social media page containing an emoji or picture could also be excluded as a benevolent gesture.

The statement, writing, or gesture must also be directed towards the injured party or the party’s family member. The statute defines family as “spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse’s parents of an injured party.” *See* GEN. LAW C. 233 S. 23D. A statement, writing or gesture made to someone other than the persons enumerated in the statute – a cousin, bystander, or witness, for example – would not be excluded by the statute, assuming they are otherwise admissible.

Provided the statement, writing, or gesture is made toward an injured party or familiar member, *Nunes* clarified that Massachusetts is a “partial apology” state in the non-medical malpractice context. Following *Nunes*, the court will parse contemporaneous statements concerning liability and sympathy, excluding those that fall within the statute while admitting those that do not. The practitioner should distinguish early on between those statements or writings “expressing sympathy or a general sense of benevolence” with contemporaneous admissions of liability. Some post-accident statements, writings or gestures may fall within a gray area and the proponent of the exclusion should seek to interpret them broadly.

The distinction between a contemporaneous expression of sympathy and an admission of liability calls into question whether the purpose of the statute is served by imposing liability on the tortfeasor who simultaneously admits guilt and expresses contrition, but the reasoning applies unless the statute is amended or the *Nunes* holding is overruled. A practitioner seeking to exclude a client's statements, writings or gestures will seek to interpret the statute broadly but must be prepared to distinguish between liability and sympathy, and rely on other grounds to exclude those that do not fall within the statute.