

13-1009. Wrongful act: Defined.

(A) [To support a claim for defamation, the defendant must have acted with malice when defendant published the communication.

Defendant acted with malice if the publication was made by defendant with knowledge that it was false or with a reckless disregard for whether it was false or not. Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

In order for you to find such knowledge of falsity or reckless disregard for whether it was false, the evidence must be clear and convincing. "Clear and convincing evidence" is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.]

(B) [To support a claim for defamation, the defendant must have been negligent when defendant published the communication. The defendant must have negligently failed to check on the truth or falsity of the communication prior to publication.

The term "negligent" may relate either to an act or a failure to act.

An act, to be "negligent," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to the reputation of another and which such a person, in the exercise of ordinary care, would not do.

A failure to act, to be "negligent," must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to the reputation of another.]

USE NOTES

The plaintiff must prove that the defendant acted wrongfully if the plaintiff is to succeed in a defamation action. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 1997, 41 L. Ed. 2d 789 (1974). The two standards of conduct applied in New Mexico are "malice" and "negligence". *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982). If the plaintiff is a public official or a public figure, the plaintiff must prove malice as defined by the United States Supreme Court. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). In such cases, the instruction contained in alternative (A) is to be given. Other plaintiffs must prove negligence. *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 480 (1982). Alternative (B) is the appropriate instruction in such cases.

Whether a plaintiff is a public figure or public official who must prove malice is a question of law for the court to resolve. See *Marchiondo v. Brown*, 98 N.M. 394, 399, 649 P.2d 462, 467 (1982). Thus, the court resolves the issue of the status of the plaintiff before submitting the case to the jury and then submits the appropriate instruction from the alternatives presented in UJI 13-1009 NMRA.