

1 **13-1009. Wrongful act: Defined.**

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

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

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

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

16 The term [“negligent”] may relate either to an act or a failure to act.

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

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

23 USE NOTES

1           The plaintiff must prove that the defendant acted wrongfully if the plaintiff is to succeed  
2 in a defamation action. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323[~~, 94 S. Ct. 1997, 41 L. Ed. 2d~~  
3 ~~789~~] (1974). The two standards of conduct applied in New Mexico are [“malice”] and  
4 [“negligence”]. *Marchiondo v. Brown*, 1982-NMSC-076, 98 N.M. 394, 649 P.2d 462[~~(1982)~~].  
5 If the plaintiff is a public official or a public figure, the plaintiff must prove malice as defined by  
6 the United States Supreme Court. [~~New York~~]*N.Y. Times Co. v. Sullivan*, 376 U.S. 254[~~, 84 S. Ct.~~  
7 ~~710, 11 L. Ed. 2d 686~~] (1964); *Curtis [Publishing]Publ’g Co. v. Butts*, 388 U.S. 130[~~, 87 S. Ct.~~  
8 ~~1975, 18 L. Ed. 2d 1094~~] (1967). In such cases, the instruction contained in alternative (A) is to be  
9 given. Other plaintiffs must prove negligence. *Marchiondo*[~~v. Brown~~], 1982-NMSC-076, ¶ 43[~~,~~  
10 ~~98 N.M. 394, 402, 649 P.2d 462, 480 (1982)~~]. Alternative (B) is the appropriate instruction in such  
11 cases.

12           Whether a plaintiff is a public figure or public official who must prove malice is a question  
13 of law for the court to resolve. *See Id.*[~~Marchiondo v. Brown~~, 98 N.M. 394, 399, 649 P.2d 462,  
14 ~~467 (1982)~~]. Thus, the court resolves the issue of the status of the plaintiff before submitting the  
15 case to the jury and then submits the appropriate instruction from the alternatives presented in UJI  
16 13-1009 NMRA.

17 [As amended by Supreme Court Order No. S-1-RCR-2025-00126, effective for all cases pending  
18 or filed on or after December 31, 2025.]

19 **Committee commentary.** — There cannot be no-fault defamation. The United States Supreme  
20 Court has ruled that public officials and public figures must establish malice in order to succeed  
21 in a defamation action. [~~New York~~]*N.Y. Times Co.*[~~v. Sullivan~~], 376 U.S. 254[~~, 84 S. Ct. 710, 11~~  
22 ~~L. Ed. 2d 686 (1964)~~] (public official); *Curtis [Publishing]Publ’g Co.*[~~v. Butts~~], 388 U.S. 130[~~,~~  
23 ~~87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)~~] (public figure). As to private plaintiffs, [“so long as

1 they do not impose liability without fault, the states may define for themselves the appropriate  
2 standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private  
3 individual[.]” *Gertz*[ ~~v. *Robert Welch, Inc.*~~], 418 U.S.[ ~~323,~~]at 347[~~,~~94 S. Ct. 2997, 41 L. Ed. 2d  
4 ~~789 (1974)~~]. The New Mexico supreme court has chosen the negligence standard: [“][I]n cases  
5 involving non-public defamation plaintiffs, . . . [i]n accord with *Gertz*, we adopt the ordinary  
6 negligence standard as a measure of proof necessary to establish liability for compensation for  
7 actual injury.[”] *Marchiondo*[ ~~v. *Brown*~~], 1982-NMSC-076, ¶ 43[~~,~~98 N.M. 394, 402, 649 P.2d  
8 ~~462, 470 (1982)~~]. The judge and not the jury determines the status of the plaintiff and the  
9 corresponding burden the plaintiff bears to show that defendant[']s conduct was wrongful:  
10 [A] plaintiff[']s status as either a public official, public figure, or private person is relevant in  
11 determining the standard by which an aggrieved party[']s proof of damages must be measured.  
12 The question of whether one is a [“]“public figure[”]” or a [“]“private person[”]” is a question of  
13 law[. . . .]  
14 *Marchiondo v. [New Mexico]N.M. State [Tribune]Trib. Co.*, 1981-NMCA-156, ¶ 35, 98 N.M. 282,  
15 [291,] 648 P.2d 321[~~,~~330 (Ct. App. 1981)], cert. quashed, 98 N.M. 336, 648 P.2d 794 (1982).  
16 The [“]“malice[”]” that public officials and public figures must establish is not mere ill will or  
17 personal hatred of the plaintiff by the defendant. *Compare Colbert v. [Journal Publishing]J.*  
18 *Publ’g Co.*, 1914-NMSC-042, 19 N.M. 156, 142 P. 146[~~-(1914)~~] (common law definition of malice  
19 applied in early defamation action). The applicable definition was established by the United States  
20 Supreme Court in [~~New York~~]*N.Y. Times Co. v. Sullivan*, 376 U.S.[ ~~254,~~]at 279-80[~~,~~84 S. Ct.  
21 ~~710, 11 L. Ed. 2d 686 (1964)~~] ([“]“ [']actual malice[']” - that is, with knowledge of falsity or with  
22 reckless disregard of whether it was false or not[”]). This instruction incorporates that language.  
23 The remainder of the language in the second paragraph fleshes out the meaning of malice. The

1 phrases are derived from *St. Amant v. Thompson*, 390 U.S. 727, 730-31[~~, 88 S. Ct. 766, 19 L. Ed.~~  
2 ~~2d 820~~] (1968).

3 In [~~New York~~]*N.Y. Times Co. v. Sullivan*, 376 U.S. [254,]at 285-86[~~, 84 S. Ct. 766, 19 L. Ed. 2d~~  
4 ~~820 (1964)~~], the supreme court declared that, when the plaintiff must prove malice, the proof must  
5 be made with [“]“convincing clarity[“]”. In New Mexico, that phrase has become equated with the  
6 [“]“clear and convincing[“]” evidence standard of the burden of proof which formerly was found  
7 in UJI Civ. 10.17 (Repl. 1981). This instruction incorporates the standard definition of [“]“clear  
8 and convincing evidence[“]” because with regard to this element of a defamation action the  
9 plaintiff[’]s burden of proof increases from a [“]“preponderance[“]” [now [“]“greater weight[“]”]  
10 of the evidence to [“]“clear and convincing[“]” evidence.

11 In cases involving neither a public official nor a public figure, the plaintiff need not prove actual  
12 malice. It is sufficient that the plaintiff demonstrate that the defendant was negligent. *Marchiondo*  
13 [~~v. Brown~~], 1982-NMSC-076, ¶ 42[~~, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982)~~]. As does the  
14 actual malice requirement, the negligence requirement focuses on the conduct of the defendant in  
15 failing to ascertain the truth or falsity of the communication prior to publication. There are other  
16 places in which the issue whether the defendant failed to exercise reasonable care might arise. The  
17 Restatement of Torts (Second) § 580B, comment b (1977) identifies four such additional areas:

18 (1) Negligence in publishing the communication as for example where the defendant did not  
19 intend to communicate [~~his~~]their written views, but negligently allowed a third person to read  
20 them.

21 This issue is adequately addressed in the text of UJI 13-1003 NMRA, which requires intentional  
22 or negligent publication.

1 (2) Negligence in failing to recognize that a communication not defamatory on its face was  
2 made so by extrinsic facts not known to the defendant.

3 Negligence here does not go to the search for truth or falsity, but rather to the issue of whether the  
4 defendant who published the false communication was negligent in failing to investigate the facts  
5 which made the statement defamatory.

6 The bracketed fourth paragraph of UJI 13-1007 NMRA deals with this issue.

7 The Restatement notes that the common law rule does not require that the plaintiff prove  
8 negligence as to this aspect of the case; instead, the general rule is that for purposes of this  
9 requirement, any violation, even a non-negligent one, can lead to liability. Restatement (Second)  
10 of Torts § 580B, comment d (1977). The drafters of the Restatement do not declare that states must  
11 impose a negligence requirement as to this issue; they merely offer the opinion that “[t]he logic  
12 of the holding in Gertz would seem to apply . . . as well and to require that there be at least  
13 negligence.” *Id.* Absent direction from the New Mexico Supreme Court to impose a negligence  
14 requirement in situations where defamatory meaning is based only on extrinsic facts, UJI 13-1009  
15 NMRA follows the common law rule.

16 (3) Negligence in composing the communication; for example, a typographical error, a slip of  
17 the tongue or the use of words with more than one meaning.

18 The committee is of the opinion that this issue is subsumed under the requirement that negligence  
19 or malice must be shown to have been the cause of the false statement and, thus, is encompassed  
20 within UJI 13-1009. If the statement is false only because of a typographical error, UJI 13-1009  
21 requires that the plaintiff prove that the falsity was caused by the failure of the defendant to  
22 exercise reasonable care to check the draft of the communication to assure that it reflected the  
23 truth.

1 (4) Negligence in regard to the reference to the plaintiff; for example, where the defendant  
2 intended to refer to one person but was reasonably understood to have referred to the plaintiff.  
3 The drafters of the Restatement speculate that the [“]“logic of the holding in Gertz[”]” might  
4 require that plaintiff prove not only that it was reasonable for the recipient of the communication  
5 to believe that it referred to plaintiff, but also that it was unreasonable for the defendant to have  
6 used words that permitted that inference. Restatement (Second) of Torts § 580B, comment d  
7 (1977). New Mexico law does not contain such a negligence requirement and the relevant New  
8 Mexico instruction continues to permit a finding that the communication was [“]“concerning the  
9 plaintiff[”]” even if the defendant did not act unreasonably in permitting the recipient of the  
10 communication to reach that conclusion. UJI 13-1005 NMRA.  
11 In sum, a private plaintiff must always prove at least negligence on the part of the defendant in  
12 failing to determine that the communication was false and in permitting the publication at all, but  
13 need not always establish negligent failure to realize that the communication was defamatory or  
14 negligence in creating the erroneous but reasonable belief that the plaintiff was the subject of the  
15 communication. These instructions reflect the current New Mexico law rather than the opinions  
16 expressed in the Restatement.  
17 [As amended by Supreme Court Order No. S-1-RCR-2025-00126.]