

**13-1002. Defamation action: Prima facie case; general statement of elements.**

(A) The plaintiff claims that the following communication was defamatory and entitles the plaintiff to recover damages:

---

(B) To establish the claim of defamation on the part of defendant, the plaintiff has the burden of proving each of the following contentions:

- [(1) The defendant published the communication; and]
- [(2) The communication contains a statement of fact; and]
- [(3) The communication was concerning the plaintiff; and]
- [(4) The statement of fact was false; and]
- [(5) The communication was defamatory; and]
- [(6) The person[s] receiving the communication understood it to be defamatory; and]
- [(7) The defendant [knew that the communication was false or negligently failed to recognize that it was false] [or] [acted with malice]; and]
- [(8) The communication caused actual injury to the plaintiff's reputation; and]
- [(9) The defendant abused [its] privilege to publish the communication.]

(C) The defendant denies the contention[s] of the plaintiff [and also claims in defense that (*the communication was true*)].

(D) To establish the defense of \_\_\_\_\_ (*theory of affirmative defenses*), the defendant has the burden of proving [at least one of] [each of] the following contention[s]:

(NOTE: List disputed factual elements relevant to affirmative defense.)

(NOTE: Repeat this format for each affirmative defense.)

(E) Related to the claims, [plaintiff] [defendant] contends and has the burden of proving that:

(NOTE: List each additional issue relevant to a party's claim or defense together with a statement of the elements of the claim or defense about which there is a factual question for the jury to resolve. For example, if plaintiff seeks punitive damages, or relies upon a theory of respondeat superior, those issues should be treated initially here.) (This [these] contention[s] is [are] denied by [plaintiff] [defendant].)

(NOTE: Repeat this format for each issue.)

(F) After considering the evidence and these instructions as a whole, you are to determine the following question[s]:

(NOTE: Here repeat the disputed contentions listed in (B) supra but now in the form of questions. For example, "Was the communication defamatory?")

If you decide that the answer to any of these questions is "No" you shall return a verdict for the defendant and against the plaintiff.

If you decide that the answer to each of the questions presented is "Yes," then [you are to determine the following question[s]:

(NOTE: Here repeat the disputed contentions listed in (C) or (D), supra, but now in the form of questions. For example, "Was the communication true?")

If you decide that the answer to this [these] question[s] is [are] "Yes", then you shall return a verdict for the defendant and against the plaintiff. If instead, you answer

"No" to this [any of these] question[s], then you shall determine the amount of money that will compensate plaintiff for the plaintiff's injuries and damages in accordance with the instructions which follow, and shall return a verdict for the plaintiff in the amount you determine.

## USE NOTES

The structure of this instruction is similar to the current negligence instructions. UJI 13-302A to 13-302F NMRA. This instruction focuses the jury's attention on the matter alleged to be defamatory, UJI 13-1002(A) NMRA, states the elements of a defamation action which are in dispute, UJI 13-1002(B) NMRA, the name of the defenses alleged by the defendant, UJI 13-1002(D) NMRA, and the elements of the defenses which are in dispute. UJI 13-1002(D) NMRA. In addition, provision is made for identification of and a statement of the elements of additional issues, such as respondeat superior, that may be relevant to particular cases. UJI 13-1002(E) NMRA.

Finally, the instruction reformulates the issues in dispute into a series of questions for the jury to consider and explains to the jury the relationship of its answers to the ultimate outcome of the case. UJI 13-1002(F) NMRA. This portion of the instruction varies from UJI 13-302F NMRA in that the negligence instruction is written with the assumption that a special verdict form will be used. In contrast, UJI 13-1002(F) NMRA omits reference to special verdict forms and can be used with whatever form of verdict the court chooses to use.

This instruction merely sets out the skeletal outline of the case and the issues to be resolved by the jury. Subsequent instructions define the elements.

In Section (A), the trial judge identifies for the jury the communication which the plaintiff alleges is defamatory. If plaintiff asserts that several different communications or portions of a communication are defamatory, the trial judge should here include each such communication. If the trial judge has decided as a matter of law that a communication alleged by the plaintiff to be defamatory is not capable of supporting an action for defamation, that portion of the communication should not be included here. See *Marchiondo v. Brown*, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982).

Section (B) lists each of the elements of a defamation action. Not every element should be listed for the jury in every case. Each provision of Section (B) is in brackets because the judge is to mention only those elements about which there is a factual dispute for resolution by the jury. If, for example, the defendant has admitted, or the judge has determined as a matter of law, that the defendant did publish the communication that is the subject of the action, the trial judge would not include Section (B)(1) in the list of contentions that the plaintiff has the burden of proving.

Section (B)(4) places the burden of proof of falsity upon the plaintiff. The United States Supreme Court mandates that the plaintiff bear this burden rather than the defendant bearing the responsibility of proving truth as a defense in most defamation actions. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). The provision is in double brackets because in one category of defamation case, where a private plaintiff alleges defamation and the defamatory statement was not of public concern, the former general New Mexico rule that truth is a defense is probably still applicable. In such a case, the judge will give an instruction that identifies truth as an affirmative defense. See UJI 13-1013 NMRA.

Section (B)(7) contains separate brackets because there are two standards of fault - negligence and malice - used in defamation actions, depending upon whether the plaintiff is a public official or figure on the one hand or a "private" person. See *Marchiondo v. Brown*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982). The determination of which type of plaintiff is involved and thus whether the malice or negligence standard is applicable is a matter of law to be decided by the judge. *Id.* at 399, 649 P.2d at 467. Based on this decision, the trial judge will select which of the bracketed provisions of Section (B)(7) to give. The first bracketed phrase in Section (B)(7) is to be used when the plaintiff must establish negligence. The second bracketed phrase is used when the plaintiff must establish that the defendant acted maliciously.

Section (B)(8) sets forth the requirement that plaintiff prove that the defamatory communication caused actual injury to plaintiff's reputation. New Mexico no longer allows presumed damages in defamation actions. *Poorbaugh v. Mullen*, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), cert. denied, 98 N.M. 47, 653 P.2d 878 (1982).

Section (B)(9) is to be used when the defendant raises the defense of qualified privilege and the trial judge concludes that such a qualified privilege exists. See *Stewart v. Ging*, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958) (trial judge decides whether qualified privilege exists). When a qualified privilege exists, plaintiff bears the burden of proof that defendant abused the privilege. *Id.* at 274-75, 327 P.2d at 336. This instruction informs the jury of the plaintiff's burden when the judge determines that defendant had a qualified privilege to publish the allegedly defamatory communication.

Section (C) introduces any affirmative defenses which the defendant relies upon, and Section (D) provides an opportunity to list in summary fashion the required elements of each defense in the same manner that Section (B) affords for the listing of the elements of the prima facie case of defamation. Because the existence of a privilege is a matter of law for the judge to decide, *Stewart v. Ging*, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958), and truth is only infrequently a defense, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986), this section may be seldom used.

Section (E) provides an opportunity for introduction of issues other than the elements of a prima facie case and the defenses asserted. For example, if the plaintiff alleges that the person who published the defamation was an employee of the defendant acting within the scope of [his] [her] employment, the respondeat superior issue and its relevant elements would be presented here together with a statement allocating the burden of proof.

Section (F) follows the format of UJI 13-302F, with the single exception that no mention is made of special verdict forms because the court is free to use a general verdict in defamation actions. See Rule 1-049 NMRA. After framing the relevant questions and describing the legal significance of particular findings as to each, the instruction concludes with a direction to consider issues of damages if the jury finds that plaintiff has established the elements of the action and the defendant either has raised no affirmative defense or has failed to prove the elements of the defense, or defenses.

The language contained within the brackets in the last paragraph of the instruction should be included only if there are affirmative defenses in issue; otherwise the language must be omitted, and the last paragraph will read, "If you decide . . . ."

[As amended, effective November 1, 1991; as amended by Supreme Court Order No. 08-8300-033, effective November 24, 2008.]