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Defamation case law in Hong Kong: A corpus-based study

DOI 10.1515/sem-2015-0114

Abstract: Defamation law is a long-standing research focus. Previous studies on defamation law have pointed out the importance of balancing two fundamental issues in law, namely, protection of reputation and freedom of speech. The present corpus-based legal study, using ConcGram 1.0 as the analytical tool, examined the phraseological profile of reported cases on defamation in Hong Kong in order to find out the types of defense and the approach to meaning in the defamation case law in Hong Kong. Regarding defenses to a defamation claim, the results show that fair comment, qualified privilege, and justification are the most prevalent types, that unintentional defamation is not used at all, and that there has been a noticeable shift from fair comment to honest comment. As for the approach to meaning, the ordinary and natural approach is found to be a pivotal means of solving the threshold problem in defamation cases, that is, whether the words involved are defamatory or not.

Keywords: defamation, case law, defenses, Hong Kong, corpus approach, linguistic evidence

1 Introduction

The Hong Kong Special Administrative Region (hereafter Hong Kong) is now in the second decade of its establishment since the handover on 1 July 1997, having a closer connection with the People's Republic of China (hereafter as PRC) in terms of her developments in economy, politics, and law. It was considered high time to examine the systems of law in Hong Kong in order to shed light on how the transition of sovereignty from Britain to PRC has affected the legal system of Hong Kong. Among different types of law in the common law jurisdictions, defamation law is indispensable. In Hong Kong, the number of case law on

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defamation is greater than any other tort (FitzGerald and Leung 2007). In Hong Kong, defamation law generally follows the English traditional law of defamation. As noted by Cottrell (2003: 39), “the law of defamation in Hong Kong is basically identical to that of the United Kingdom before the enactment of the latter’s *Defamation Act 1996* (UK).” However, it has been noted that in some post-handover defamation cases, the courts in Hong Kong do not follow the English tradition (e.g., *Albert Cheng And Another V. Tse Wai Chun Paul* [2001]; *Next Magazine Publishing Ltd And Another V. Ma Ching Fat* [2003]), and that the authorities from other jurisdictions may not necessarily apply to the defamation cases in Hong Kong. In Hong Kong after the handover, in addition to case law in the form of precedents recorded in Hong Kong Law Reports and Digest, the governing legislations on defamation are, namely, the Basic Law of Hong Kong, Bill of Rights Ordinance, and Defamation Ordinance.¹ The present study is, however, more interested in examining case law, which includes the law made by the judge through precedents over time.

Studies of defamation law in common law jurisdictions such as the United Kingdom, Australia, and the PRC (e.g., Carter-Ruck 1990; Collins 2010; George 2006; Liebman 2006; McNamara 2007; Milo 2008; Norrie 1995; Pember and Calvert 2006; Rolph 2008) suggest a dichotomy between freedom of speech and protection of reputation. Some studies (e.g., George 2006; Liebman 2006; Pember and Calvert 2006) find that the overprotection of reputation in defamation law has curtailed or even threatened freedom of speech. Other studies (e.g., McNamara 2007; Milo 2008; Rolph 2008) argue that defamation law should provide greater protection for reputation rather than overemphasizing freedom of speech. Similarly, in Hong Kong, studies conducted to examine defamation cases that involve the media (e.g., Collins 2010; Cottrell 2003; Docherty 2000; Weisenhaus et al. 2007) contend that in media defamation cases, it is essential to strike a balance between freedom of speech and protection of reputation. An important finding of these studies is that maintaining such a balance is heavily dependent on two main issues, namely, the nature of the defenses to defamation and the approach to meaning. Defenses to defamation refer to grounds such as fair comment, justification, and privilege that are used to defeat a defamation claim (e.g., Liebman 2006; Mau, 2010; McNamara

¹ These legislations differ in their emphases: Article 27 of the Basic Law focuses on freedom of speech; Bill of Rights Ordinance aims to strike a balance between the freedom of expression and protection of reputation (Article 16); Defamation Ordinance distinguishes between libel and slander and lays down some defenses such as fair comment, qualified privilege, and justification. These written laws established by legislature are relatively stable and limited.

2007; Milo 2008; Rolph 2008). The approach to meaning is concerned with how to determine the meaning of words or statements in defamatory dispute cases (e.g., Chan 2003; Nicholson 2000; also see *Oriental Daily Publisher Ltd and Anor v. Ming Pao Holdings Ltd and Ors*, CACV [2010] 139; *Bouwer and Others v Tea and Coffee Distributors EP CC and Another* (1225/2002) [2011] ZAECELLC 7; *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310). For instance, in discussing the judgment of *McDonald's v. Steel* dated March 31 of 1999, in which the English Appellate Court overruled the trial court on the application of the law to some of the allegedly defamatory statements, Nicholson (2000: 32) notes that it is correct, according to the traditional English approach to defamation cases, to determine the “natural and ordinary” meaning of the words. However, Nicholson (2000: 55) also notices that there is not always just one “natural and ordinary” meaning of the words, because the same words may be understood differently by “ordinary persons,” given the context and circumstances; similarly, Cheng and Cheng (2014) have noted that legal interpretation is a socio-semiotic enterprise. In the High Court of Hong Kong on a trial of defamation,² it was heard that the Plaintiff, relying “solely on the natural and ordinary meaning of the words” in a paragraph (Paragraph 2), objected to the words. From the viewpoint of the Judge, “the choice of the court is to ascertain the ordinary and natural meaning of Paragraph 2 and to decide out of the 3 possible choices, which is the ordinary and natural meaning of the relevant words.”

A review of the literature shows that previous studies have concentrated on a few areas: specific defenses of defamation in single defamation cases, how specific words and statements in a defamation case are interpreted differently, and how different meanings are negotiated by different parties. Some studies adopt the method of case study (e.g., Liebman 2006; Chen and Ang 2008) in their analysis of defamation cases in other jurisdictions. Others (e.g., Collins 2010; Cottrell 2003; George 2006; Mau 2010; Weisenhaus et al. 2007) conduct discourse analytical research of the defamation law with a primary focus on the merit of the law itself. The importance of integrating linguistic and legal analyses to better understand legal genres has been noted (e.g., Bhatia 2004; Mellinkoff 1963; Gibbons 2003). Mellinkoff (1963: vi), for example, argues that “the law is a profession of words,” emphasizing that the actual substance of legal norms is dependent on the linguistic realizations. In other words, the binding nature of legal rules is inextricably linked with the wording, and the related interpretation, of the legal norms.

² *Nam Tai Electronics, Inc. V. Pricewaterhouse Coopers Hca* [2000] 6783; Reported in: [2005] 2 HKLRD 461.

In the field of corpus linguistics, knowledge about the patterns of word co-selection in a corpus enables the researcher to better understand how meanings are created (Sinclair 1996). Words do not remain “perpetually independent in their patterning” (Sinclair 2004: 30). Instead, it is rather the phraseological tendency of natural language that makes words co-select to create meaning (Sinclair 2004). As a result, some word combinations are intrinsically “more privileged – more frequent, more meaningful, more significant – than others” (Philip 2011: 36). In the present study, identifying the phraseological profile, defined as “all of the word associations in a corpus” (Warren 2010: 181), of the case law on defamation in Hong Kong can, therefore, reveal objectively the nature and pattern of form-meaning that are characteristic of defamation judgments as a genre. Findings will then make it possible to describe essential elements of defamation case law, including the medium of defamation, defenses to defamation, and the approach to the meaning of words.

The present inter-disciplinary study of legal language and communication examines a specialized corpus of defamation cases in Hong Kong so as to better understand “the characteristics of the genre” (Sinclair 2001: xi). It examines “the full evidence of the corpus” and “analyses the evidence with the aim of finding probabilities, trends, patterns, co-occurrences of elements, features or groupings of features” (Teubert and Krishnamurthy 2007: 6). This corpus-based study aims to find out and describe the phraseological profile and pattern (Sinclair 1996, 2004; Hunston 2002; Cheng et al. 2006, 2009) that construe meanings in defamation cases in Hong Kong, and to provide new insights to the legal portrayal of the defamation case law in Hong Kong, and elsewhere, particularly related to the two important issues in defamation law: the nature and types of defenses to defamation and the approach to meaning. In examining the defenses to defamation, the lexical frequency and relative distribution of word co-selections specific to different types of defense in Hong Kong defamation case law were compared with those as prescribed in Defamation Ordinance. The purpose was to determine prevalent kinds of defense in Hong Kong defamation cases and to describe any changes in defamation case law with reference to Defamation Ordinance. In examining the approach to meaning of words, word co-selections in the specialized corpus were analyzed to find out how different participants in the court in Hong Kong, such as the court, the lawyer, and the litigants, negotiate meanings in their determination of the meaning of statements in defamation cases. Such an evidence-based linguistic study should provide some useful guidelines for the legal practitioners in Hong Kong as well as those in other common law jurisdictions.

2 Methodology of study

Most of the defamation cases in the common law jurisdictions, with Hong Kong as an example, are civil cases because defamation in these jurisdictions is governed by common law or tort law rather than criminal law. In Hong Kong, in the normal course of events, a judgment is published on the website of the Hong Kong Judiciary³ within three working days of its being received. Cases of great importance or public interest are placed under “Newly Added Judgments” on the same day of their delivery. In the database on the website, judgments that are of significance as legal precedents on points of law, practice, and procedure of the courts and of public interest from the courts (for Court of Final Appeal since its establishment in 1997) delivered since 1946 (judgments of civil actions before High Court) are available.

Reported defamation cases for this study were retrieved by using the lexical search engine on the website of the Hong Kong Judiciary. First of all, search words, namely, *defame*, *libel*, *slander*, and their inflectional and derivational words (e.g., *defamation*, *defamatory*, *defamed* and *defaming* for *defame*) were entered to identify relevant cases. Then all the cases were checked manually based on four criteria, namely, whether they are defamation cases; whether they are reported cases; whether the jurisprudential value of the cases was high; and whether the cases are in English. The corpus (approximately 500,000 words) consisted of 58 reported English defamation judgments from June 1993 to February 2010, six of which were before 1997 obtained from the High Court in Hong Kong (consisting of the Court of Appeal and the Court of First Instance) and the Court of Final Appeal in Hong Kong. In order to better interpret and explain the results of the study of defamation reported cases in Hong Kong, the wider socio-cultural and political backgrounds of Hong Kong will be considered (Bhatia 2004).

This study used the method of concgramming (Cheng and Cheng 2014; Cheng et al. 2006, 2009; Greaves 2009; Greaves and Warren 2007) to identify both word co-selections and phraseological variation in the corpus of reported defamation cases in Hong Kong. The phraseological lexical engine *ConcGram 1.0* (Greaves 2009) was used. *ConcGram 1.0* was designed specifically to fully and automatically find co-occurrences of words and/or phrases across a word span irrespective of consistency variation and positional variation (Cheng et al. 2006, 2009). The unique strength of *ConcGram 1.0* lies in its capability of extending the

3 <http://www.judiciary.gov.hk/>.

notion of keyness beyond keywords to include a fuller range of phraseology by revealing the co-selections in a given corpus (Warren 2010: 181).

With *ConcGram 1.0*, first, the automated functions of unique words and exclusion list, with the latter automatically excluding the top 50 grammatical words in the British National Corpus (Ahmad 2005) from being searched, were used to generate a unique (i.e., single) word list. Second, the user-nominated function was used to generate two-word and three-word concgram lists for a more extensive analysis of certain word combinations. A concgram includes all instances when one or more words are found between the co-occurring words (i.e., constituency variation), and if the co-occurring words are in different positions relative to one another (i.e., positional variation), e.g., “play a role,” “play a key role,” “have a role to play” (Cheng et al., 2006, 2009). Third, the concordances for certain concgrams were studied to better understand the semantic and functional meanings (Sinclair 1996) associated with the concgrams. In this way, the use of *ConcCram 1.0* enables the examination of corpus data to reveal the co-selections of words made by writers of the reported defamation cases in order to determine and quantify the phraseological profile of the language contained within the corpus and hence the ways in which meanings are created and expressed in the corpus.

3 Results and discussion

3.1 Predominant words and meanings of judgments of reported defamation cases

Table 1 lists the most frequent 50 lexical words in the half-million-word corpus of English defamation civil cases in Hong Kong, enabling an understanding of the prevalent ideas, and hence meanings, of the judgments of reported defamation cases captured in the corpus.

From the analysis of the unique lexical words of the judgments of reported defamation cases, three main findings are observed. First, the co-selection of *Hong* (47th) and *Kong* (48th) indicates that the corpus is about defamation cases in Hong Kong rather than from other jurisdictions. Second, being one type of courtroom discourse, the defamation judgments contain a number of lexical words (30 of the 50 [60%]) characteristic of procedural law. These words are *COURT*, *plaintiff(s)*, *case*, *law*, *defendant(s)*, *evidence*, *APPEAL*, *Article*, *judge*, *action*, *order*, *judgment*, *right*, *section*, *view*, *question*, *decision*, *person*, *Ordinance*, *proceedings*, *issue*, *claim*, *justice*, *application*, *courts*, *costs*, *held*, and *tribunal*. This finding confirms that

Table 1: Top 50 lexical words in the corpus of reported defamation civil cases in Hong Kong.

rank	word	Freq.	Percentage	rank	Word	Freq.	Percentage
27	COURT	1,779	0.3814	100	fact	505	0.1083
35	Plaintiff	1,353	0.2901	101	letter	503	0.1078
38	case	1,264	0.2710	102	person	498	0.1068
39	law	1,260	0.2701	103	words	496	0.1063
41	Defendant	1,244	0.2667	105	matter	487	0.1044
46	evidence	1,099	0.2356	106	comment	484	0.1038
47	Hong	1,090	0.2337	111	immunity	475	0.1018
48	Kong	1077	0.2309	116	damages	444	0.0952
52	APPEAL	970	0.2080	119	trade	438	0.0939
53	plaintiffs	958	0.2054	121	defense	434	0.0930
54	made	948	0.2032	124	fair	421	0.0903
55	said	926	0.1985	125	Ordinance	421	0.0903
58	Article	863	0.1850	129	proceedings	416	0.0892
59	defendants	851	0.1824	133	issue	405	0.0868
67	judge	737	0.1580	135	claim	404	0.0866
70	action	722	0.1548	138	justice	387	0.0830
71	order	705	0.1511	139	application	382	0.0819
72	judgment	701	0.1503	140	courts	378	0.0810
82	right	604	0.1295	141	statement	376	0.0806
87	section	569	0.1220	142	stated	373	0.0800
89	view	568	0.1218	143	malice	372	0.0798
93	state	548	0.1175	149	costs	356	0.0763
95	question	531	0.1138	150	held	352	0.0755
96	public	522	0.1119	151	tribunal	352	0.0755
97	decision	515	0.1104	152	meaning	345	0.0740

defamation judgments, as a type of judicial discourse (Cheng 2010a, 2010b), share the same set of registrational lexis (Wong and Sin 2003; Cheng 2010a) with other judgments in criminal and administrative cases. Third, the remaining 18 lexical words include acts of the defamer (*made*, *said* and *state[d]*), media of defamation (*letter*, *words*, *matter*, and *statement*), defense-related issues (*fact*, *comment*, *immunity*, *fair*, *malice*, *damages*, *trade*, *defense*, and *public*), and the meaning of statements (*meaning*), all of which contribute to the construction of essential elements of defamation, namely, defamatory statements, identification (third-party recognition), publication (accessible to third party), fault (strict liability, actual malice or negligence in different stages and contexts), falsity, and injury to reputation.⁴

⁴ Hong Kong Defamation Ordinance.

3.2 Phraseological profile of defenses to defamation

In Hong Kong, defenses to a defamation claim laid down in Defamation Ordinance are, namely, unintentional defamation,⁵ justification,⁶ fair comment,⁷ and privilege (including qualified privilege).⁸ In order to find out whether these defenses are borne out by the 58 reported defamation civil cases in the corpus, two-word congrams with “defense” (N = 434, 0.09%) as the origin were generated (Table 2).

Table 2: Top 20 two-word congrams with defense as the origin.

rank	Origin	co-selection	freq.	rank	origin	co-selection	freq.
1	defense	fair	154	11	defense	Should	21
2	defense	privilege	58	12	defense	Only	19
3	defense	qualified	54	13	defense	Law	18
4	defense	justification	46	14	defense	defamatory	17
5	defense	malice	33	15	defense	established	17
6	defense	such	30	16	defense	Judge	17
7	defense	out	28	17	defense	Made	15
8	defense	no	26	18	defense	plaintiff	15
9	defense	defeat	22	19	defense	So	15
10	defense	may	21	20	defense	evidence	14

The top five co-selected words with *defense* are *fair*, *privilege*, *qualified*, *justification*, and *malice* (Table 2), showing that fair (comment), qualified privilege, and justification are the most common types of defenses to defamation in Hong Kong. This finding confirms that the defenses in defamation cases in Hong Kong basically conform to the prescription in Defamation Ordinance.

As described, in defamation law, in order to strike a balance between freedom of speech and protection of reputation, a defense is usually employed as a mechanism to constrain the overprotection of reputation. Lord Nicholls, for instance, remarked that reputation was over-emphasized in the history of defamation law:

Historically the common law has set much store by protection of reputation. Publication of a statement adversely affecting a person’s reputation is actionable.

⁵ See Section 25 of the Defamation Ordinance (Cap. 21); HCA2140/2008 & HCA597/2009.

⁶ See Section 26 of the Defamation Ordinance (Cap. 21).

⁷ See Section 27 of the Defamation Ordinance (Cap. 21).

⁸ See Section 13, Section 14, Section 28 and the Schedule of the Defamation Ordinance of the Defamation Ordinance (Cap. 21).

The plaintiff is not required to prove that the words are false. Nor, in the case of publication in a written or permanent form, is he required to prove he has been damaged.⁹

This shows that truth or justification via proof of truth is a complete defense but the burden of proof lies on the defendant. Such a rigorous, reputation-protective principle has been found to cause a “chilling effect” for the potential penalties on the persons who distribute arguably defamatory statements (e.g., Collins 2010; Liebman 2006; McNamara 2007), and thus curtailing the freedom of expression and possibly preventing useful information from being disseminated, as the information distributor has to ensure its truth in advance. This undoubtedly causes a price to pay for the protection of reputation. The law, therefore, invents the notion of “fair comment” as a defense. The right of fair comment, as a cornerstone in defamation law, is “one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements.”¹⁰

Another finding is that among the top twenty two-word concgrams, no word co-selection is found between *defense* and *unintentional*. The nominated search function was then used to search for any co-selection of *defense* and *unintentional* but no instances were found. In fact, no occurrence of *unintentional* was found in the corpus. It can, therefore, be concluded that unintentional defamation is not implemented as a defense in Hong Kong case law, possibly because it is difficult for a defendant to prove his own unintentional defamation based on certain evidence. In addition, the unintentional defamation allows a defendant to make an offer of compensation by publicly withdrawing innocently published defamatory words in order to avoid liability (Mau 2010). In other words, the defense of unintentional defamation usually occurs before a dispute goes to the court, which can account for no occurrence of unintentional defamation in defamation judgments as a type of courtroom discourse in the corpus.

3.2.1 From fair comment to honest comment

As discussed, Table 2 gives us a prime facie impression that fair comment, qualified privilege, and justification are the primary defenses to defamation in Hong Kong case law. The concordance lines of “defense/fair,” “defense/privilege,” and “defense/justification” were then studied to describe the patterning of word association specific to the three types of defense.

⁹ Per Lord Nicholls in REYNOLDS V TIMES NEWSPAPERS LIMITED [1999] 3 WLR 1010.

¹⁰ Per Lord Denning in Slim V. Daily Telegraph Ltd [1968] 2 QB 157; [1968] 1 All ER 497.

10 root cause of the difficulty here is that the **defense of fair** comment is bedevilled by its name and by
 11 warrant for thus cutting down the scope of the **defense of fair** comment. Disinterestedness cannot always
 12 which falls within the objective limits of the **defense of fair** comment can lose its immunity only by
 13 with the understanding that when considering the **defense of fair** comment they were entitled to
 14 Now, the reason why malice would defeat the **defense of fair** comment is that a person, although the
 15 courts should adopt a generous approach to the **defense of fair** comment: “In a society which greatly
 16 law should not adopt a narrow approach to the **defense of fair** comment. See *Eastern Express Publisher*
 17 which falls within the objective limits of the **defense of fair** comment can lose it immunity only by
 18 was insufficient of itself to defeat the **defense of fair** comment, as this Court had held in *Cheng*
 19 in the light of the present law relating to the **defense of fair** comment as stated in *Cheng Albert*,
 20 the appeal is concerned with no more than the **defense of fair** comment, and damages is relevant to that

Figure 1: Sample concordance lines from the two-word concgram “defense/fair”.

A close examination of the concordance of “defense/fair” (N = 154) shows that the phraseology *thGGe defense of fair comment* is frequent (N = 97, 63%; Figure 1).

In Hong Kong before *Albert Cheng*, as in England, the defendant has the burden of proof of the elements of the defense of fair comment, but the defense can be defeated if the plaintiff proves malice on the part of the defendant (Mau 2010). The accepted core of fair comment is the right of any person to comment on matters of public concern, provided that the comment is based on identifiable and true (or privileged) statements of fact (Cottrell 2003). According to Section 27 of Defamation Ordinance:

in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defense of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

In defamation cases, the defendants may include individuals, body entities (including universities), and corporate entities (including news media companies). For the news media, they may defend in defamation cases by (qualified) privilege, but for the defendants in general (including news media), what they can use to protect themselves is usually fair comment. As an important safeguard for freedom of speech, fair comments facilitate and justify fair and honest comments on public matters. Fair comments also make it possible for people to discuss these matters fairly, freely, and openly without fear of liability, just as held per Justice Li in *Albert Cheng*:¹¹

¹¹ *Albert Cheng And Another V. Tse Wai Chun Paul*; Reported in: [2000] 3 HKLRD 418; (2000) 3 HKCFAR 339.

Freedom of speech (or the freedom of expression) is a freedom that is essential to Hong Kong's civil society. It is constitutionally guaranteed by the Basic Law (art. 27). The right of fair comment is a most important element in freedom of speech. The courts should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigor.

As long as a defense of fair comment is established, the burden of proof will be shifted onto the plaintiff to prove the defendant's malice in order to defeat such a defense. The frequent occurrence of *the defense of fair comment* in the corpus (N = 97, 63%) shows that the most important defense in the defamation cases in Hong Kong is whether or not a comment is fair, and this finding can be verified by examining the co-selection patterns of *comment* (Table 3). As shown in Table 1, the word *comment* (N = 484, 0.10%) is frequent in the corpus, with "comment/far" and "comment/defense" (Table 3) being the most frequent co-selections.

The adjectives that are co-selected with *comment* at N-1 (see Table 4 and Figure 2) are discussed, as follows:

Table 3: Top 10 co-selections with comment as the origin.

Rank	Origin	co-selection	freq.
1	Comment	Fair	281
2	Comment	Defense	156
3	Comment	Must	48
4	Comment	Fact	43
5	Comment	Facts	31
6	Comment	Public	31
7	Comment	One	28
8	Comment	Made	27
9	Comment	Whether	27
10	Comment	Matter	26

Table 4: Adjectives co-selected with comment at N-1.

Adjective	Freq.	Adjective	Freq.	Adjective	Freq.
Fair	242	Brief	1	misleading	1
honest	6	discrete	1	online	1
concluding	5	Earlier	1	pungent	1
defamatory	4	journalistic	1	permissible	1
political	4	Mere	1	stinging	1

312 f's case. I will return to this matter. Honest Comment 91. Although the judge was not at fault, his dire
 313 lines. I repeat that on a new trial both honest comment and Reynolds privilege could be advanced as defence
 314 tends that the words so understood contain honest comment on a matter of public interest based on facts whic
 315 f this defense is misleading. Comment, or honest comment, would be a more satisfactory name. In this judgment
 316 Lord Nicholls says it should be relabelled honest comment. 127. For the respondent Mr Michael Thomas SC arg
 317 inapplicable to the defense of fair (i.e. honest) comment. So to hold would be consistent with the freedom

Figure 2: Sample concordance lines from the two-word concgram 'comment/honest'.

Table 4 shows a big difference in the frequencies of *fair comment* (N = 242) and *honest comment* (N = 6), indicating that *fair comment* is the most frequent defense in Hong Kong defamation cases. As for *honest comment*, the phrase was found to be used for the first time in Hong Kong in 2000 in *Albert Cheng*,¹² in which Lord Nicholls stated that:

This is an appeal in a defamation action. It raises an important point on the defense of fair comment. The title of this defense is misleading. Comment, or honest comment, would be a more satisfactory name. In this judgment I adhere, reluctantly, to the traditional terminology. (para 15)

Lord Nicholls then proceeded to deal with the outer limits of the defense (fair comment)¹³ and concluded that the burden of establishing that a comment falls within these limits, and hence within the scope of the defense, lies upon the defendant who wishes to rely upon the defense. In other words, Lord Nicholls herein implicitly advocates the use of *honest comment* rather than *fair comment*.

3.2.2 Qualified privilege

The two-word concgram "defense/privilege" occurs 56 times and the three-word concgram "defense/qualified/privilege" 51 times, showing that *qualified privilege*

¹² Albert Cheng And Another V. Tse Wai Chun Paul. All the traceable judgments using "honest comment" in Hong Kong Judiciary website are delivered after 13 November 2000, when the judgment of Albert Cheng was handed down.

¹³ First, the comment must be on a matter of public interest. Second, the comment must be recognizable as comment, as distinct from an imputation of fact. Third, the comment must be based on facts which are true or protected by privilege. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views. For detailed elaboration, see Albert Cheng And Another V. Tse Wai Chun Paul.

6 scintilla of evidence is required to destroy the **defense** of qualified **privilege**. 17. In Mckenzie, ClarkJA
 7 (5) If the answer to Issue(4)(b) is yes, is the **defense** of qualified **privilege** nevertheless defeated by
 8 be left to the jury is no different whether the **defense** is qualified **privilege** or fair comment and that
 9 was the same as the malice that would defeat a **defense** of qualified **privilege**. As explained by Lord
 10 an opportunity of pleading, if so advised, a **defense** of qualified **privilege** on the principles of
 11 a piece of responsible journalism to which the **defense** of qualified **privilege** was available. 146.
 12 exist are not the same. The rationale of the **defense** of qualified **privilege** is the law's recognition
 13 of the word. This is so in the context of the **defense** of qualified **privilege**. It is no wonder that
 14 been comprehensively analysed in relation to the **defense** of qualified **privilege**, most notably in the
 15 be untrue. 43. It follows that, subject to any **defense** of qualified **privilege**, ATOL must be liable to

Figure 3: Sample concordance lines from the two-word concgram “defense/privilege”.

is one of the most frequent defense types (Table 2). Examination of the concordance of “defense/privilege” shows the phraseology *defense of qualified privilege* (N = 35; Figure 3), suggesting that *qualified privilege* rather than *privilege* (3 out of 56, 5.4%) is a defense that is more acceptable in defamation cases.

The defense of privilege in Hong Kong, according to Mau (2010: 75), can be divided into absolute privilege and qualified privilege. Absolute privilege includes judicial, parliamentary, and official statements; the defense of qualified privilege puts the onus of proof on the defendant to prove that such a privilege is reasonably used only on occasions where the communicator has an interest or duty to convey a statement to the receiver, who has a legitimate interest or duty to receive it (Mau 2010: 75). Further searches in the corpus found no occurrence of “defense/absolute/privilege,” which may be interpreted as in Hong Kong, judicial, parliamentary, and official statements do not constitute defamation.

3.2.3 Justification

Justification is a well-established traditional defense in defamation and also one of the defenses in Hong Kong (Figure 4). The co-selection of “defense/justification” (N = 46) ranks only fourth in the corpus (Table 2), which can be explained by the difficulty in the establishment of such a defense, and the effort made in Hong Kong to minimize the chilling effect via other defenses, such as fair comment and qualified privilege. Figure 4 shows that the defendant may put forward the *defense of justification* (N = 28), but the defense of justification may

11 the substance of it. The judge rejected the **defense** of **justification** because the appellants' plea of
 12 am satisfied that the defendant put forward the **defense** of **justification** in relation to the 1st to
 13 that the defendant has failed to establish the **defense** of **justification** for each of the 1st to
 14 the trial the defendants no longer pursued their **defense** of **justification**. What I have called a confusing
 15 the action on the ground that the defendants' **defense** of **justification** succeeded. The judge also said
 16 they are pleadings of evidence in support of the **defense** of **justification** and as such the same is
 17 that, despite her counsel's abandonment of the **defense** of **justification** on the allegation that the
 18 of what is asserted to establish the common law **defense** of **justification** may well deter a would-be critic
 19 ground. C. Maintaining the non-maintainable **defense** of **justification** In Gately, the learned editors
 20 over the top in so alleging. I now turn to the **defense** of **justification**. VII. ISSUE(4)(A) – IS THE

Figure 4: Sample concordance lines from the two-word concgram “defense/justification”.

fail (line 13), and it may be non-maintainable (line 19), rejected (line 11), abandoned (line 17), or no longer pursued (line 14).

3.2.4 Malice

The concordance of “defense/malice” (N = 33) was examined.

Findings show that *malice* is to defeat different types of defense, as in *to defeat the defense of fair comment by alleging “malice”* (line 4), *the pleading of the defense of justification may be evidence of malice* (line 6), and *the issue of malice in the defense of qualified privilege* (line 12; Figure 5). In other words, if the plaintiff can prove malice on the part of the defendant, even if the defenses

4 agreed. Here the plaintiff sought to defeat the **defense** of fair comment by alleging “**malice**” but he
 5 to have been made with honest belief and the **defense** would only be defeated by proof of **malice**. The
 6 It has been stated that the pleading of the **defense** of justification may be evidence of **malice**, but
 8 For the above reasons, I rule that the **defense** of qualified privilege is defeated by **malice**. X.
 10 are that all the defendants established the **defense** of fair comment but the plaintiff proved **malice**
 12 the jury to decide on the issue of **malice** in the **defense** of qualified privilege. 16. The head-note of
 13 the plaintiff has proved **malice** to defeat the **defense**. 81. The verdict in favour of the 3rd defendant

Figure 5: Sample concordance lines from the two-word concgram “defense/malice”.

1 **defeat** the **defense** of fair comment by alleging “**malice**” but he could in no way invite an inference of
 2 to the question whether the plaintiff has proved **malice** to **defeat** the **defense**. 81. The verdict in favour
 3 pleaded was capable in law of constituting **malice** to **defeat** the **defense** of fair comment. No
 4 is on the 2nd plaintiff. Now, the reason why **malice** would **defeat** the **defense** of fair comment is that
 5 is on the 2nd plaintiff. Now, the reason why **malice** would **defeat** the **defense** of fair comment is that
 6 extent elsewhere, that in defamation law the **malice** that would **defeat** a **defense** of fair comment was
 7 judgment in *Cheng v. Tse* where the confines of “**malice**” which might **defeat** a **defense** of fair comment
 8 a **defense** of fair comment was the same as the **malice** that would **defeat** a **defense** of qualified

Figure 6: Sample concordance lines from the three-word conigram “malice/defeat/defense”.

are established, the defendant is still liable for his defamation. This can be further confirmed by examining the concordance of the three-word conigram “defense/malice/defeat” (Figure 6).

Figure 6 shows that as long as the plaintiff can prove malice (line 2), such malice would defeat a defense of fair comment (lines 3–7) or a defense of qualified privilege (line 8). Figure 6 also shows that *malice* is more often used to defeat *fair comment* (75%, 6 of 8 instances) than to defeat *qualified privilege* (12.5%, 1 out of 8) and this finding concurs with previous ones that fair comments are used more frequently as defense than qualified privilege (Table 2).

3.3 Determining meaning in defamation cases

Table 5 shows the top 20 co-selections with *defamation*.

Table 5: Top 20 co-selections with defamation.

	Co-selection	Freq.		Co-selection	Freq.
1	law	41	11	Meaning	10
2	plaintiff	29	12	Only	10
3	Ordinance	17	13	whether	10
4	us	17	14	where	10
5	no	16	15	Kong	9
6	should	14	16	See	9
7	under	12	17	falsehood	8
8	one	11	18	Its	8
9	proceedings	11	19	Japan	8
10	may	10	20	malicious	8

Table 6: Co-selection patterns at N + 1 of defamatory.

	Co-selection	Freq.		Co-selection	Freq.
1	statement(s)	45	11	content	3
2	meaning(s)	44	12	sense	3
3	imputation(s)	23	13	letters	2
4	comment(s)	10	14	nature	2
5	words	9	15	action	1
6	matter(s)	7	16	material	1
7	charge(s)	6	17	radio	1
8	publication(s)	6	18	remarks	1
9	sting	4	19	reports	1
10	article	3	20	terms	1

As shown in Table 5, in addition to co-selecting the procedural lexis (e.g., *law*, *plaintiff*, *Ordinance*), the word *defamation* particularly co-selects derogatory words (*falsehood*, *malicious*), which indicates that a negative attitude toward defamation, as one would normally expect. The word *meaning* ranks high (eleventh) among others, indicating that once a defamation claim comes to the court (with the procedural lexis as the indication of the court as the scene and setting), the very first task for the court to deal with is the *meaning* of words (also see Table 7).

An analysis of all of the 306 concordance lines with *defamatory* as the origin shows many lexical words at N + 1 of *defamatory* (Table 6).

Table 6 shows that among the most frequent lexical words are three types of nouns: reporting nouns (*statement(s)*, *imputation(s)*, *comment(s)*, *words*, *remarks*, *reports* and *terms*), material nouns (*publication(s)*, *article*, *letters*, *material* and *radio*), and denoting nouns (*meaning(s)*, *sense*). The first finding is that reporting nouns usually report on the sources, i.e., the authors of the defamatory expressions, which is very important to identify the defendant. Second, material nouns indicate what kinds of medium is used for the dissemination of the expression, which is vital to distinguish between slander and libel on the one hand and provide prime facie evidence on the other because evidence cannot exist in vacuum but rather is transmitted or conveyed via a certain type of medium. In each and every case, evidence is both crucial and necessary in winning a case. All the activities in court proceedings by lawyers on behalf of the litigants and judges revolve around the identification and examination of evidence. Evidence exists in the forms of substance, object, and equipment. With reference to evidence, defamation cases do not make much difference, so lexical words that express substances, materials, objects, and equipment count

Table 7: Top 10 co-selections of meaning.

	Origin	Co-selection	Freq.
1	meaning	words	79
2	meaning	ordinary	68
3	meaning	natural	62
4	meaning	within	26
5	meaning	pleaded	23
6	meaning	plaintiff	22
7	meaning	no	20
8	meaning	paragraph	18
9	meaning	understood	16
10	meaning	meanings	15

for almost 60% among the top 20 lexical words at the N + 1 of *defamatory*. Third, denoting nouns (30%) are concerned about meaning, which is highly essential in defamatory cases.

The importance of meaning in defamation cases is clearly reflected in the co-selection patterns with *defamation* (see Table 5) and *defamatory* (see Table 6) as origins, as well as the frequency of *meaning* (N = 345, 0.07%; Table 1). In other words, one of the most important tasks in defamation cases is to identify the *meaning of words*. A closer examination of the most frequent ten co-selected words of *meaning* (Table 7) shows that other than *words* (N = 79), the most frequent co-selected words are *ordinary* (N = 68) and *natural* (N = 62).

The corpus was further searched for the three-word conigram “meaning/ordinary/natural” (N = 57).

Concordance analysis reveals both the phraseologies *natural and ordinary meaning* (N = 37, 65%) and *ordinary and natural meaning* (N = 19, 33.3%) co-selecting *the words in question/complained of* (see the samples in Figure 7), indicating that one vital issue in defamation cases is the *ordinary and natural* approach to the *meaning of words* (N = 79). Such an approach is supported in *Gatley* (Busuttill et al. 2008: 81): “[w]ords are normally construed in their natural and ordinary meaning, i.e., the meaning in which reasonable people of ordinary intelligence, with the ordinary person’s general knowledge and experience of worldly affairs, would be likely to understand them.”

Defamation may arise from the ordinary and natural meaning of the words complained of, and defamation based on innuendo.¹⁴ A further examination of

¹⁴ HCA 3831 [1997] Oriental Press Group Ltd. V. Next Magazine Publishing Ltd. And Others; Reported in: [2000] 3 HKLRD 412 citing Lord Devlin in *Lewis v. Daily Telegraph Ltd* [1964] 1 AC 234, 281.

14 and 93. Second, the **ordinary and natural meaning** of words may be either the literal
 17 of 24 September 1997 in its **ordinary and natural meaning** meant and was understood to mean that: "(1) Dr
 18 the 17 October letter in its **ordinary and natural meaning** meant and was understood to mean that: "(1)
 19 used can be part of the **ordinary and natural meaning**. The **ordinary and natural meaning** may therefore
 21 11 It is not clear if on a **natural and ordinary meaning**, the defendant meant that the slanders were laid
 22 in his findings as to the **natural and ordinary meaning** of the words. As to the correct approach of an
 23 was not defamatory. The **natural and ordinary meaning** of the words in the First Statement perceived by
 24 these words to bear the **natural and ordinary meaning** of the plaintiffs appearing "to be wanting to

Figure 7: Sample concordance lines from the three-word conigram "meaning/natural/ordinary".

the corpus shows that the frequency of *natural and ordinary meaning* and *ordinary and natural meaning* ($N = 57$) is much higher than that of *innuendo* ($N = 8$) and *innuendos* ($N = 2$). Therefore, it can be said that in the defamation cases in Hong Kong, the principle of determining defamation is the *natural and ordinary* approach, which is context-dependent, rather than the inference of defamatory meaning based on innuendo, which is plainly defamatory. More importantly, abiding the natural and ordinary principle, the standard is objective. In other words, such a literal meaning is decided with reference to the world knowledge of the members of the public. However, in the context of innuendo, a subjective standard is adopted, since "we are not concerned with the knowledge of the members of the public, but with that of the readers of the article to whom the words are published."¹⁵ Such subjectivity usually makes the proof on the part of the plaintiff difficult and sometimes even inadmissible, which can explain why there are only a few defamation cases based on innuendo.

In the corpus of defamation law in Hong Kong, *innuendo* only appears 8 times and *innuendos* only 2 times in only three judgments.¹⁶ In all the three cases, none of the defamation claims based on innuendo was supported by the courts. The small number of innuendo cases can be explained by the risk that may be incurred for a party to lodge a defamation suit where the meaning of the words is still implicit or arguable.

¹⁵ Oriental Press Group Ltd. V. Next Magazine Publishing Ltd. And Others; Reported in: [2000] 3 HKLRD 412.

¹⁶ Oriental Press Group Ltd. V. Next Magazine Publishing Ltd. And Others; Reported in: [2000] 3 HKLRD 412; Nam Tai Electronics, Inc. V. Pricewaterhouse Coopers; Reported in: [2005] 2 HKLRD 461; Peregrine Investments Holdings Ltd V. The Associated Press; Reported in: [1997] HKLRD 1073.

4 Conclusion

This study shows how a corpus-based study enables us to visit the fundamental issues in defamation cases in Hong Kong. The evidence-based study concludes that the primary concerns in Hong Kong's case law on defamation are the defenses to defamation and the approach to meaning. The ordinary and natural approach to the meanings of words provides a pivotal means to solve the threshold problem in defamation cases, that is, whether the words involved are defamatory or not. The defenses to defamation, particularly the evolution from fair comment to honest comment, have gained more room for freedom of speech in Hong Kong and greater attention to Hong Kong's judicial practice from other common law jurisdictions. The findings related to the adoption of an ordinary and natural approach to the determination of meaning seem to match the expectation since such an approach is well-established in defamation cases. However, the finding regarding the shift in the defense from fair comment to honest comment indicates the feasibility and prominence of using a corpus-based approach to track the latest development in defamation law. When dealing with defamation, judges in Hong Kong will weigh the balance between freedom of speech and protection of reputation. There is a trend from emphasizing reputation to highlighting freedom of speech in Hong Kong that can be demonstrated from the evolution of defenses to defamation.

Funding: The work described in this paper was substantially supported by National Social Sciences Foundation (Project No.: 15BYY012) a grant from the Research Grants Council of the Hong Kong Special Administrative Region (Project No.: 1-ZV7D).

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