

THE COURTROOM IN EVERY BOARDROOM

“They have sued!” Our frantic in-house counsel exclaimed. He was not always this dramatic, but it had been a long day. A miscommunication between us and one of our suppliers had resulted in losses on their end. Our in-house counsel had tried to make amends, without success. We were slapped with a law suit, a law suit that our advocate really wanted to avoid.

Our first hearing would happen within a week of that day, and as an intern at the company, I was instructed to accompany the team heading to court to provide any assistance needed, and what an experience it was!

Courts are an elegant institution with many traditions and complexities that have been developed over time to solve legal disputes. Before a solution is arrived at, however, there is a rigorous process that is undertaken to ensure that truth and justice, which are the objects of the judicial process, are arrived at. Courts as they known today have existed for well over a millennium, during which their systems have evolved to augment the ability of the institution to perform its role in society.

The result of so many years of creating a system that optimizes the reception of information, its analysis and eventually, the making of a decision is quite impressive. There is so much that can be learnt about critical thinking, problem solving and leadership from judicial systems around the world!

WHAT IS CRITICAL THINKING?

There is not one universally agreed upon definition of critical thinking. Scholars have construed the concept differently. One definition is by Scriven. He defines critical thinking as the intellectually disciplined process of actively and skilfully conceptualizing, applying, analysing, synthesizing, and/or evaluating **information** gathered from, or generated by, observation, experience, reflection, reasoning, or

communication, **as a guide to belief and action.**¹ I find this definition particularly impressive because it highlights the fact that for critical thinking to be applied, one's beliefs must be inspired by information.

Another definition that brings to the fore important aspects of critical thinking is by Noreen and Peter Facione. They aver that critical thinking has several significant features which include: **being open-minded to different sides, being inquisitive and curious**, being able to think systematically, **being analytical, being persistent to truth**, being confident about critical thinking itself, and lastly, being mature.²

Others, however, have understood critical thinking in a more expansive manner. Carmichael Kirby, for one, has opined that critical thinking is not exclusively for problem solving. **It is meant to improve one's thinking process.** He suggests that one applies critical thinking when they think in a way that is organized, efficient and **aware of its own biases and errors.**³ In my opinion, this definition is quite intriguing. Critical thinking is more about thinking effectively than it is about finding a solution. Critical thinking could help one arrive at a better decision, but that is only a byproduct. The end goal of critical thinking, at least under Kirby's conception, is improving one's thinking.

THE FACTS

Turning from that short detour, I observed during my day in court that establishing the facts of a case is of infinite value to a judge. As aforementioned, truth is one of the objects of the judicial process. Deciphering the truth from a myriad of allegations, suppositions and research has also proven to be quite the daunting task for leaders in other sectors. Indeed, reliance on misleading information has led to

¹ (Scriven and R. 1996) as quoted by Critical Thinking. University of Tennessee Chattanooga. Accessed on 28/05/2020 <https://www.utc.edu/walker-center-teaching-learning/teaching-resources/ct-ps.php#what-ct>

² Facione, Peter A.; Facione, Noreen C. (March 1993). "Profiling critical thinking dispositions". *Assessment Update*. 5 (2): 1–4. doi:10.1002/au.3650050202. ISSN 1041-6099. (Facione and Facione 1993)

³ Carmichael, Kirby; letter to Olivetti, Laguna Salada Union School District, May 1997 as quoted by https://en.wikipedia.org/wiki/Critical_thinking#cite_ref-20 (Kirby 1997)

massive losses for many companies and organizations. For instance, financial market experts who have examined the 2008 Ireland banking crisis have found that the crisis can be linked to cognitive biases that led to stakeholders underestimating risks.⁴

Biases will be explored at a later point in the essay. In this section, the focus is how to determine what information one should rely on and what information should be side-lined.

Our advocate made us carry a lot of material, from correspondence to contracts which would be adduced in court as evidence. Judges' decisions are made based solely on evidence presented during trial. The Law of Evidence is a well-developed area of the law that provides rules that govern the type of evidence that is admissible in court as well as how this evidence will be evaluated.⁵ Admissibility basically refers to whether evidence qualifies for consideration by a judge.

These rules are created to assist judges ensure that the information on which they rely will aid in the realization of the goals of the judicial system which are truth and justice.

By way of illustration, in most jurisdictions, a confession the commission of a crime obtained through torture will not be admitted by courts. The rationale for this rule is that reliance on such information will cast a long shadow of doubt on whether the decision made attained the court's desired end.⁶

Similarly, leaders must be clear on their desired end. Albeit there may be competing priorities, they must know what it is they want to achieve overall and, from this premise determine what information will enable them achieve this end, as well as the information that could prevent them from achieving the same. Like a judge, they

⁴ (Heijltjes, 2014) quoting Lunn, P. D. (2011). The role of decision-making biases in Ireland's banking crisis. Economic and Social Research Institute (ESRI)

⁵ The term 'admissibility', in this case, is also used to mean relevance and materiality of the facts.

⁶ (Black, 1886)

must determine the 'admissibility', 'relevance' and 'materiality' of information even as they make efforts to define the problem.

Snapchat could speak to this. On February 21st 2018, Kylie Jenner tweeted, "sooo does anyone else not open Snapchat anymore? Or is it just me... ugh this is so sad."

This comment resulted in a \$1.3 billion loss in market value for Snapchat.⁷

Apparently, the layout of the app was difficult to navigate, which affected its usability. I suppose that it was Snapchat's goal to retain its users, then any information or feed back from them should have been deemed relevant for decision making.

THE ANALYSIS

THE ADVOCATES

If a court room was a theatre, then the advocates are the actors who bring the drama to life. "My Lord, your Ladyship, and may it please this honorable court, my name is..." and on he went to introduce himself and to restate the facts in a manner favorable to his client. I did not understand the necessity for the strange formalities, but I knew that when I manage to climb up the professional ladder, I must ensure that in my boardroom, I have people that will enable me to make sense of information just like the judge had advocates to help him understand a dispute.

Critical thinking has so much to do with openness to the ideas of others.⁸ It involves one being able to appreciate the fact that in complex issues, there may be several valid positions.⁹ A leader must be privy to the evidence, logic, and authorities relied upon by persons who hold a different opinion from theirs. They must also understand the assumptions, implicit values and philosophies that underpin these

⁷ (Yurieff 2018)

⁸ Supra Note 2

⁹ (uwosh, n.d.)

positions. In my opinion, the implication of these necessities is that one needs a team with which one can think optimally.

At times, however, people in boardrooms do not enjoy the luxury of time like is the case in court. Many times, the decisions must be made quickly and the amount of time available to consult is limited. I find that the Vrooms Decision Tree would be instrumental in such a case. The tree is designed to help a leader determine the amount of team involvement necessary based on various variables for example time constraints, amount of information available to the leader and the structure of the problem.¹⁰

Peter Drucker in his article 'Managing Oneself' demonstrates the importance of working with one's team in order to promote one's critical thinking. He proposes that a leader must be aware of how they perform so that they can harness the forces of their juniors to ensure their own optimal performance. A fine example of a business leader referred to in the article who took advantage of his team to facilitate his critical thinking is Alfred Sloan, a long-time president, chairman and CEO of General Motors Corporation. He is said to have led lively meetings, after which he would take time to reflect on issues raised during the meeting, questions that were raised and issues that were uncovered but not resolved, and detail all of these in a letter that would be addressed to an attendee of the meeting. He did this to keep the issues fresh in his mind, but he also achieved a habit of reflective thought, a priceless skill in critical thinking.¹¹

LEARNING FROM THE PAST

"We rely on the case of *Tumaini Selfridges v Depak Singh*(2001), in which this court held that the entire performance rule should not be applied where goodwill has been demonstrated."

¹⁰ (Google Sites, n.d.); (Gleeson, 2012)

¹¹ (Drucker, 2005)

I was puzzled by this reference. Our advocate's demeanor implied that he was certain that his statement was authoritative. I later found out that it was in line with the doctrine of *stare decisis et non quieta movere*; a legal maxim that requires the makers of judicial decisions to abide by past decisions on similar matters and that settled points of law remain undisturbed.¹² This doctrine is applied in the analysis of the facts of a case; I figured that there must be a way to integrate this into decision making in the boardroom. I decided that I must learn to look to the past in my efforts to find a solution.

Leaders around the world when called upon to think critically and solve problems study how similar problems were solved in the past. The former British Speaker John Bercow noted that, "History is more than the path left by the past. It influences the present and can shape the future."¹³ Leaders have often looked to past decisions by respectable leaders for inspiration and insight. Peter Drucker himself demonstrated quite the fondness for history in his writings through his references to past decisions of different leaders.

BIAS

Ignorance is preferable to error, and he is less remote from the truth who believes nothing than who believes what is wrong

-Thomas Jefferson¹⁴

Leaders must perform a delicate balancing act between learning from the past, and avoiding bias. Bias is a strong inclination of the mind or a preconceived opinion about someone or something. It could prove to be one of the biggest threats to critical thinking.

¹² (Black 1886)

¹³ (www.parliament.com 2011)

¹⁴ (Kaminski, 2005)

Because of the nature of court operations, advocates must be biased, but the judge, who is the ultimate decision maker, has a responsibility to avoid bias at all cost.

Biases are promoted by fast thinking otherwise known as system 1. Overtime, the human brain develops inferences that are made quickly to help us process information. The brain is adapted to think fast, not to think critically. Whereas fast thinking is necessary for everyday life, it cripples critical thinking that is necessary for complex issues like those that business leaders often face. Critical thinking seeks to eliminate bias and other errors in thinking through more deliberate and self-reflective thought.¹⁵

Our brains are susceptible to biases because they are coherence-seeking. Often we try to create a story from the information that is available, its quality or lack thereof notwithstanding. The better the story the more convinced we are. These stories we create are often more coherent if they are one-sided. People who act on limited information are often prone to, among others, overconfidence bias. People, on the other hand who decide while aware of many possible arguments tend to be more aware and cautious. This is the conclusion of an experiment by Brenner, Koehler and Tversky in a courtroom, where one group decided based on a version of events presented by a prosecutor, another group acted on a version of events presented by the defense, and another group decided after hearing both versions. The group that decided after hearing both versions was more cautious and even uncertain, while the other groups displayed overconfidence.¹⁶

¹⁵ (Kahneman, 2011) as quoted by Battersby, Mark and Bailin, Sharon, "Critical thinking and cognitive biases" (2013). OSSA Conference Archive. 16.
<https://scholar.uwindsor.ca/ossaarchive/OSSA10/papersandcommentaries/16>

¹⁶ (Brenner, Koehler, & Tversky, 1996) as quoted by Battersby, Mark and Bailin, Sharon, "Critical thinking and cognitive biases" (2013). OSSA Conference Archive. 16.
<https://scholar.uwindsor.ca/ossaarchive/OSSA10/papersandcommentaries/16>

It is therefore paramount that one thinks slowly, taking time to analyze how they think and creating ample room for other opinions, if they are to be considered critical thinkers.

DIFFERENT COURT DIVISIONS

After that exhilarating time in the courtroom, on our way out, I noticed plaques indicating different court divisions. There was a Children's Court Division, an Environmental and Lands Court Division, and so on. Our advocate was a commercial lawyer, and quite an excellent one. His work seemed to come so naturally to him. He chose a line of work that suited his strengths.

During the analysis of a problem one may discover that it is better to work in a profession that one has strengths in. I will rely on Gardner's Intelligences to illustrate people's different abilities. Imagine a hypothetical John. John has intrapersonal and logical-mathematical intelligences. He is indeed intelligent but may not do so well as a trial advocate. He may struggle to apply critical thinking as far as drafting arguments and satisfying the theatrical demands of a court room. This is among the main propositions of Peter Drucker's article 'Managing Oneself'. He avers that where one does not have strengths, he cannot perform. He continues to say that it takes far more energy and resources to improve in an area of low competence than it would to improve an area in which one is already competent.¹⁷

I must take a moment to appreciate the unique challenges that business leaders face. In court, the decisions maker relies on knowledge from past decisions to determine how they will solve an instant problem. It seems to me that this approach would be ineffective and potentially catastrophic if applied without assistance by a business leader. This is because the world of business is ever changing and it rewards the

¹⁷ (Drucker 2005)

most innovative in problem solving. A business leader must also be forward looking, because the future will belong to innovators.

As for the court case, I am not sure how it ended. My internship was over before the long drawn court process. I do hope our advocate won.

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