



## Alabama Law Scholarly Commons

---

Working Papers

Faculty Scholarship

---

6-17-2016

### Ode to Adams v. Bullock: Cardozo Was a Behavioral Economist

Fredrick E. Vars

University of Alabama - School of Law, fvars@law.ua.edu

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_working\\_papers](https://scholarship.law.ua.edu/fac_working_papers)

---

#### Recommended Citation

Fredrick E. Vars, *Ode to Adams v. Bullock: Cardozo Was a Behavioral Economist*, (2016).

Available at: [https://scholarship.law.ua.edu/fac\\_working\\_papers/724](https://scholarship.law.ua.edu/fac_working_papers/724)

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

THE UNIVERSITY OF  
**ALABAMA**  
SCHOOL OF LAW

**Ode to *Adams v. Bullock*: Cardozo Was a  
Behavioral Economist**

Fredrick E. Vars

19 GREEN BAG 2d 331 (2016)



This paper can be downloaded without charge  
from the Social Science Research Network

Electronic Paper Collection:

<http://ssrn.com/abstract=2796604>



# ODE TO *ADAMS V. BULLOCK*

## CARDOZO WAS A BEHAVIORAL ECONOMIST\*

*Fredrick E. Vars*

Tort law asks juries to ignore what they know  
And give plaintiffs relief only if they show  
That the defendant should have foreseen the harm  
As likely enough to raise an alarm.<sup>1</sup>

At that we do poorly,<sup>2</sup> especially so  
When the chance of the harm is markedly low.  
For here people err in a damaging way:  
“Those small odds are bigger,” they typically say.<sup>3</sup>

---

*Fredrick Vars is a professor at the University of Alabama School of Law. Copyright 2016 Fredrick E. Vars.*

\* See *Adams v. Bullock*, 125 N.E. 93, 93 (N.Y. 1919) (Cardozo, J.) (“We think that ordinary caution did not involve forethought of this extraordinary peril.”). For an overview of behavioral economics and law, see *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND LAW* (Doron Teichman & Eyal Zamir, eds., 2014).

<sup>1</sup> See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571 (1998) (“[D]etermining whether a tort defendant failed to take reasonable care . . . require[s] that a judge or jury ignore what they have learned in hindsight.”).

<sup>2</sup> See Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 335, 341 (Daniel Kahneman, Paul Slovic, & Amos Tversky, eds., 1982) (“In hindsight, people consistently exaggerate what could have been anticipated in foresight.”).

<sup>3</sup> See Reid Hastie & W. Kip Viscusi, *What Juries Can’t Do Well: The Jury’s Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 910 (1998) (“For low probability events that have been

*Fredrick E. Vars*

These defects in reason, if left unchecked,  
Could mean an award for every sore neck.  
But tort law gives judges an unnoticed<sup>4</sup> trump  
To counter the bias as would a good ump.

No recovery lies for events too rare.<sup>5</sup>  
It's as if the injury just isn't there.  
With caution this doctrine should judges apply,  
Though after this rhyme at least they'll know why.<sup>6</sup>



---

called to people's attention, people usually overestimate the level of the risk."); *see generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *ECONOMETRICA* 263 (1979).

<sup>4</sup> A leading article lists examples of the legal system recognizing and responding to hindsight bias, but fails to mention this one, which is implicated in every negligence case. *See* Rachlinski, *supra*, at 602-624. *See also* Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1526 (1998) ("Hindsight bias seems to be so deeply ingrained in the tort system that even when it is called to a court's attention, it may be difficult for the court (never mind a juror) to recognize or address it.").

<sup>5</sup> *See* RESTATEMENT (SECOND) OF TORTS § 435(2) (1965) ("The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.").

<sup>6</sup> There is some evidence that judges are less susceptible than juries to these biases, Jolls et al., *supra*, at 1526, but even if they are not, the doctrine pulls tort law back in the right direction.