Law can be seen as including both primary rules (rules that tell ordinary people like us what liability if any we incur when we do an act like driving 75 mph or manufacturing a defective product that injures a consumer) and secondary rules – rules that allocate decisional authority across possible legal-institutional decisionmakers, such as:

- Legislature v. judiciary
- Trial court v. appellate court
- Judge presiding at trial v. the jury.

Our sequence of common law cases – Boyd, L&M, Crigger, R. J. Reynolds, and Macpherson – presents three kinds of questions for decision.

- A policy question: When should a consumer injured by a defective product have recourse to the manufacturer for compensation?
- An interpretive question: In view of the common law cases and their outcomes on the duty of care question, what kinds of products come within the scope of the IDP exception to the privity rule? (How should the balance between the privity rule and the IDP exception be struck?)
- An allocative question: Who gets to decide the policy question and the interpretive question?

Consider one instance of the allocative question. You are the judge presiding in New York state trial court in Macpherson v. Buick Motors. You are considering which of the following three options is the best way to decide the question whether defendant Buick Motors (the manufacturer of the Buick) owed a duty of care to plaintiff Macpherson.

1. (Most favorable to defendant). Rule as a matter of law that an automobile is not the kind of product that comes within the IDP exception to the rule that manufacturers owe a duty of care only to those with whom the manufacturer has a contractual relationship. Accordingly, grant defendant’s motion for a directed verdict.

2. (Intermediate position). Reject plaintiff’s theory that an automobile is, as a matter of law, an IDP. Instruct the jury that it should decide the step 1 duty issue in favor of plaintiff if the defendant ought to have foreseen that the car, if negligently constructed, would become imminently dangerous. (See PR p. 93.)

3. (Most favorable to plaintiff). Rule as a matter of law that an automobile is the kind of product that comes within the IDP exception to the rule that manufacturers owe a duty of care only to those with whom the manufacturer has a contractual relationship. Accordingly, instruct the jury that it should find defendant liable to plaintiff if defendant failed to exercise reasonable care in manufacturing the automobile (the step 2 breach or negligence issue) and if that failure to exercise reasonable care caused plaintiff’s injury (the step 3 issue).

Judge Cardozo, writing for the Majority in the state supreme court, says about option 3 (PR p. 93): “We do not say that the court would not have been justified in ruling as a matter of law that the car was a dangerous thing. If there was any error, it was none of which the defendant can complain.” Cf. Judge Cardozo’s comment on the nature of the step 1 duty of care question when plaintiff consumer seeks recovery from defendant manufacturer, PR p. 90: “Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury.”