

THE RIGHT APPROACH TO WRONGFUL BIRTH?: THE  
KANSAS RIGHTS TO JURY TRIAL AND REMEDY BY DUE  
COURSE OF LAW

*TILLMAN V. GOODPASTURE*, 485 P.3D 656 (KAN. 2021).

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I. INTRODUCTION

On April 30, 2021, the Kansas Supreme Court upheld a state statute that abolished the wrongful birth cause of action, holding that the statute did not violate the right to a jury trial or right to a remedy by due course of law under the Kansas Constitution.<sup>1</sup>

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1. *Tillman v. Goodpasture*, 485 P.3d 656, 659 (Kan. 2021); *see* KAN. STAT. ANN. § 60-1906(a) (2013).

This Comment will first examine the facts underlying the plaintiffs' claim for wrongful birth. It will then turn to the reasoning of the Kansas Supreme Court in holding that the Kansas statute at issue does not violate the Kansas Constitution, as well as Justice Stegall's concurrence in part and dissent in part and Chief Justice Luckert's and Justice Rosen's dissents. It will then analyze the majority's holding; first, by trying to untangle the case from the issue of abortion, then, by examining how wrongful birth fits into a traditional medical malpractice tort understanding, and finally, by unpacking the way that the court applied section 5 and section 18 of the Kansas Bill of Rights. The purpose of this Comment is to examine *Tillman v. Goodpasture* to determine whether wrongful birth should be a new and distinct cause of action in Kansas—and thus, one that the Kansas legislature can abolish—or whether wrongful birth should be protected by the Kansas rights to jury trial and remedy by due process of law.

## II. STATEMENT OF THE CASE

Dr. Katherine Goodpasture began providing obstetrical prenatal care to Alysia Tillman in November 2013.<sup>2</sup> Dr. Goodpasture performed two ultrasounds while Tillman was in her care: one in January 2014, in which she reported normal anatomy, and one about sixteen weeks later, in which she reported an “irregularly shaped fluid-filled space in the brain.”<sup>3</sup> The day after the second ultrasound, Tillman underwent an MRI of her fetus.<sup>4</sup> The MRI revealed the developmental birth defect schizencephaly.<sup>5</sup> A few days later, Tillman gave birth to a baby girl with “severe and permanent neurological, cognitive, and physical impairments.”<sup>6</sup> Schizencephaly is not medically correctable;<sup>7</sup> treatments include physical therapy, medication to prevent seizures, and, in some cases, a surgically placed shunt in the brain.<sup>8</sup>

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2. *Tillman*, 485 P.3d at 659.

3. *Id.* at 659.

4. *Id.* at 659–60 (alteration in original).

5. *Id.* at 660.

6. *Id.*

7. *Id.*

8. Cheryl Whitten, *What to Know About Schizencephaly*, WEBMD (Nov. 11, 2021) <https://www.webmd.com/children/what-to-know-about-schizencephaly>.

Schizencephaly is defined as:

[A]n extremely rare developmental birth defect characterized by abnormal slits, or clefts, in the cerebral hemispheres of the brain. Babies with clefts in both hemispheres (bilateral clefts) commonly have: [d]evelopmental delays[,] [d]elays in speech and language skills[,] [and] [p]roblems with brain-spinal cord communication[.] Individuals with clefts in only one hemisphere (unilateral clefts)

The plaintiffs, Tillman and Storm Fleetwood, the baby's father, brought suit against Goodpasture, alleging that the doctor "negligently failed to inform them about serious fetal abnormalities observable from an ultrasound."<sup>9</sup> They claimed that knowing this information would have led them to terminate the pregnancy.<sup>10</sup> Tillman and Fleetwood sought to recover the costs of caring for a severely and permanently disabled child, costs they would not have incurred if the pregnancy had been terminated.<sup>11</sup> The district court dismissed the case because the Kansas statute at issue, section 60-1906, abolished the wrongful birth cause of action, and the Kansas Court of Appeals affirmed the district court's dismissal.<sup>12</sup> Tillman and Fleetwood sought review by the Kansas Supreme Court, which affirmed the lower courts' dismissals and held that the Kansas statute did not violate the plaintiffs' constitutional rights to a jury trial or to a remedy by due course of law.<sup>13</sup>

### III. BACKGROUND

#### A. *Wrongful Birth and the Prenatal Torts*

It is helpful to begin by placing the wrongful birth cause of action in context. The prenatal torts can be simplified into three distinct causes of action: wrongful birth, wrongful life, and wrongful pregnancy or conception.<sup>14</sup> Wrongful birth claims are brought by one or more parents—

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are often paralyzed on one side of the body but may have average to near-average intelligence.

National Institute of Health, *Schizencephaly Information Page*, NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE (Jan. 20, 2023), <https://www.ninds.nih.gov/health-information/disorders/schizencephaly#:~:text=Schizencephaly%20is%20an%20extremely%20rare,in%20speech%20and%20language%20skills>. It is not clear from the facts of *Tillman* whether Tillman's child has clefts in one or both hemispheres of her brain.

9. *Tillman*, 485 P.3d at 659; see also Ellen Wright Clayton, *Medicolegal Aspects of Prenatal Diagnosis*, in *GENETIC DISORDERS AND THE FETUS: DIAGNOSIS, PREVENTION, AND TREATMENT* 1741 (Aubrey Milunsky & Jeff M. Milunsky, eds., John Wiley & Sons, Inc. 2015) (e-book). In recent years, advances in prenatal diagnosis technology have allowed for "direct examination of the fetus by fetoscopy, ultrasonic and magnetic resonance imaging, and indirect determination of fetal status by amniocentesis, chorionic villus sampling, fetal tissue sampling, and . . . analysis of cell free fetal DNA obtained from maternal serum." *Id.* These advances and the expansion of knowledge surrounding prenatal diagnosis "ha[ve] dramatically increased the physician's obligation to keep patients fully informed about their reproductive options." *Id.*

10. *Tillman*, 485 P.3d at 659.

11. *Id.*

12. *Id.* at 660.

13. *Id.* at 559.

14. Bruce R. Parker et al., *What's Unconstitutional About Wrongful Life Claims? Ask Jane Roe . . .*, 87 DEF. COUNS. J. 1, 3 (2020); Rachel Tranquillo Grobe, *The Future of the*

usually at least the mother—and claim that, but for the negligence of the healthcare provider, the parent(s) would have terminated the pregnancy.<sup>15</sup> Wrongful life claims are similar, but are brought on behalf of the child and claim that the “defendant’s breach of the applicable standard of care precluded the parents from aborting the pregnancy.”<sup>16</sup> Wrongful pregnancy or wrongful conception claims are “brought by the parents of a healthy, but unwanted, child against a pharmacist or pharmaceutical manufacturer for negligently filling a contraceptive prescription, or against a physician for negligently performing a sterilization procedure or an abortion.”<sup>17</sup>

Currently, only three states recognize the tort of wrongful life: California, Washington, and New Jersey.<sup>18</sup> Thirty states plus Puerto Rico recognize wrongful pregnancy or wrongful conception in some form, though most states do not allow recovery for the cost of raising a healthy child.<sup>19</sup> Twenty-five states plus the District of Columbia recognize some form of wrongful birth.<sup>20</sup> The states vary in how, and in fact if, they recognize wrongful birth.<sup>21</sup> Some states, like Alabama and Indiana, recognize wrongful birth as a type of medical malpractice claim.<sup>22</sup> Maine

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“*Wrongful Birth*” Cause of Action, 12 PACE L. REV. 717, 720–21 (1992); CTR. FOR DIGNITY IN HEALTHCARE FOR PEOPLE WITH DISABILITIES, WRONGFUL BIRTH AND WRONGFUL LIFE: STATES AND TERRITORIES 1 [hereinafter Fact Sheet], <https://www.kennedykrieger.org/sites/default/files/library/documents/community/maryland-center-for-developmental-disabilities-mcdd/MCDD%20WBFactSheet070821.pdf> (July 8, 2021). See generally Catherine Palo, *Cause of Action for Wrongful Birth or Wrongful Life*, 23 CAUSES OF ACTION 2d 55 (Oct. 2003).

15. Parker et al., *supra* note 14, at 3 (“The underlying premise is that negligently performed or omitted genetic counseling or testing foreclosed the parents’ ability to make an informed decision regarding whether to conceive a genetically disabled child or, in the event of a pregnancy, to terminate the pregnancy.”); see also *Tillman*, 485 P.3d at 660 (Tillman and Fleetwood “claim Tillman would have terminated her pregnancy had Goodpasture accurately reported the [first] ultrasound results, and that the doctor’s negligence deprived Tillman of her right to make an informed decision about her options”).

16. Parker et al., *supra* note 14, at 3.

17. Grobe, *supra* note 14, at 721.

18. Parker et al., *supra* note 14, at 12. All three states limit damages to the cost of the extraordinary care caused by the child’s birth defects and provide for expenses after the child has reached majority. *Id.*

19. Fact Sheet, *supra* note 14. For example, Maryland and Missouri recognize wrongful pregnancy or conception as typical medical malpractice, New Hampshire recognizes wrongful conception as its own cause of action, and many states limit recovery to the costs of the failed medical procedures (like a failed vasectomy or failed tubal ligation). *Id.* at 9–11.

20. *Id.*; see Mariam Gaiparashvili, *Wrongful Birth and Wrongful Life Cases from a Human Rights Perspective*, 2020 HERALD OF L. 11 (2020) (Ga.) for an international comparison of the torts of wrongful birth and wrongful life.

21. See generally Fact Sheet, *supra* note 14.

22. *Id.* at 1, 7.

specifies that “it is the birth of the child, and not the child’s defect, that must be proximately caused by the physician’s negligence.”<sup>23</sup> And Arizona has specifically disallowed adoptive parents from bringing a wrongful birth claim under the theory that the adoptive parents could not have chosen to terminate the pregnancy.<sup>24</sup> Until 2013, Kansas recognized wrongful birth as a distinct cause of action.<sup>25</sup>

With the passing of section 60-1906, the Kansas legislature prohibited the commencement of any civil action for wrongful life or wrongful birth, as well as the recovery of damages for the physical condition of a child “if the damages sought arise out of a claim that a person’s action or omission contributed to such minor’s mother not obtaining an abortion.”<sup>26</sup> The statute defines a claim of wrongful birth as “a cause of action brought by a parent . . . which seeks damages . . . as a result of a physical condition of such minor . . . [at] birth, and which is based on a claim that a person’s action or omission contributed to such minor’s mother not obtaining an abortion.”<sup>27</sup> In essence, the statute prevents parents and guardians from arguing that, if not for the negligent conduct of the medical practitioner, they would have chosen to terminate the fetus rather than birth and care for a severely and permanently disabled child.<sup>28</sup>

Prior to the passing of section 60-1906, Kansas recognized wrongful birth as a separate cause of action from traditional medical malpractice.<sup>29</sup> In *Arche v. United States*, the Kansas Supreme Court held that the wrongful birth tort was recognized in Kansas and that damages could be recovered for the costs incurred because of a child’s disability.<sup>30</sup> The *Arche* Court discussed “three types of related malpractice torts”: wrongful pregnancy, wrongful life, and wrongful birth.<sup>31</sup> The court held that Kansas recognized the wrongful birth cause of action, but that it was only appropriate where the child is severely and permanently handicapped.<sup>32</sup> It assumed that “there is negligence on the part of the defendants; that the gross defects of the child could have been determined by appropriate testing prior to birth; that defendants owed plaintiffs a duty to perform

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23. *Id.* at 8 (quoting *Thibeault v. Larson*, 666 A.2d 112, 115 (Me. 1995)).

24. *See id.* at 2.

25. *See Tillman v. Goodpasture*, 485 P.3d 656, 659 (Kan. 2021); *Arche v. United States*, 798 P.2d 477, 487 (Kan. 1990).

26. KAN. STAT. ANN. § 60-1906(a) (2013).

27. *Id.* § 60-1906(d)(2).

28. *See Tillman*, 485 P.3d at 659.

29. *See Arche*, 798 P.2d at 487 (Six, J., concurring) (referring to the wrongful birth cause of action as “this new claim” (emphasis added)).

30. *Id.* at 487 (majority opinion).

31. *Id.* at 478.

32. *Id.* at 480.

such tests; and that no such tests were offered or performed . . . [or] were negligently performed.”<sup>33</sup>

The Republican-controlled Kansas legislature passed section 60-1906 in 2013.<sup>34</sup> The law came at the urging of abortion opponents and was supported by former Kansas Governor Sam Brownback, a Republican, and opposed by current Governor Laura Kelly, who was a state senator at the time.<sup>35</sup> In 2019, the Kansas Supreme Court, criticized by abortion opponents as being “too liberal,” held that abortion was a fundamental right under the Kansas Constitution.<sup>36</sup> If the United States Supreme Court were to overrule *Roe v. Wade*,<sup>37</sup> access to abortion in Kansas would still be protected.<sup>38</sup> But two years later, the court held that the Kansas legislature was free to abolish the tort of wrongful birth, in effect stating that the right to abortion was protected, but the “lost chance to abort” was not.<sup>39</sup>

### *B. Medical Malpractice in General*

Medical malpractice claims are broad and varied. Common types of medical malpractice include misdiagnosis, surgical or anesthesia errors, medication errors and prescription mistakes, and birth injuries.<sup>40</sup> In misdiagnosis cases, the plaintiff claims that a competent doctor would have recognized and diagnosed the correct illness or condition.<sup>41</sup> Misdiagnosis can lead to the condition progressing to an advanced stage

33. *Id.* at 481.

34. John Hanna, *Top Kansas Court Upholds Law Barring ‘Wrongful Birth’ Suits*, AP NEWS (Apr. 30, 2021), <https://apnews.com/article/kansas-laws-courts-business-health-3d7adc2e25261fdcd36585b4f32da9f6>.

35. *Id.* Former Governor Brownback also signed a bill in 2013 that “declared life began at fertilization, banned sex-selection abortions, prohibited tax breaks or deductions for abortion services, blocked abortion providers from participating in public school sex education classes and required doctors to tell women abortions could raise their risk of breast cancer.” Tim Carpenter, *Justice Stegall Denounces Kansas Supreme Court’s Refusal to Overrule ‘Black Mark’ Decision*, KAN. REFLECTOR (May 1, 2021, 12:43 PM), <https://kansasreflector.com/2021/05/01/justice-stegall-denounces-kansas-supreme-courts-refusal-to-overrule-black-mark-decision/>.

36. Hanna, *supra* note 34.

37. 410 U.S. 113, 153 (1973). The U.S. Supreme Court overruled *Roe* on June 24, 2022, with its decision in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2234 (2022).

38. John Hanna, *Kansas Court Bolsters Abortion Rights, Blocks Ban*, AP NEWS (Apr. 26, 2019), <https://apnews.com/article/3f479b218a6140719e1694fcfdb8036>.

39. See *Tillman v. Goodpasture*, 485 P.3d 656, 669 (Kan. 2021) (Stegall, J., concurring in part and dissenting in part).

40. *Common Types of Medical Malpractice*, JUSTIA (Oct. 2022), <https://www.justia.com/injury/medical-malpractice/common-types-of-medical-malpractice/>.

41. *Id.*

and can cause the death of the individual.<sup>42</sup> Surgical errors are often considered “never events,” in which the medical professional acknowledges that the error should never occur.<sup>43</sup> Examples include surgeons leaving an instrument in the body cavity, operating on the wrong patient or the wrong body part, causing careless injury to another body part during the procedure, and complications after the surgery.<sup>44</sup> Anesthesia errors include the failure to review records for risk factors, giving the patient improper instructions before the procedure, giving the patient the wrong dose of anesthesia, failure to monitor the patient’s vitals while administering anesthesia, and the use of defective equipment—which will often also involve a claim against the manufacturer of the equipment.<sup>45</sup> Doctors are commonly held liable for mistakes made in the prescription process, while nurses and hospitals are commonly held liable for mistakes made during the administration of medications.<sup>46</sup> Finally, birth injuries include the failure to diagnosis a medical condition or a birth defect, as well as errors during the delivery process, such as failure to order a cesarean section, failure to handle complications competently, and failure to use proper equipment during the delivery.<sup>47</sup>

In Kansas, a plaintiff claiming medical malpractice must prove three elements: duty, breach, and causation.<sup>48</sup> The plaintiff must show that the physician owed her, the patient, a duty of care, that the physician breached that duty by acting negligently, and that a causal connection exists between the breached duty and the injury she suffered.<sup>49</sup> In a surgical error medical malpractice case, for example, the surgeon might owe the patient a duty to not leave a surgical sponge in the patient’s abdomen. By leaving the surgical sponge in the patient’s abdomen, that duty has been breached. If the patient develops sepsis because of the surgical sponge being left in her abdomen, she can show that a causal connection exists between the breach—leaving the sponge in the abdomen—and the injury.<sup>50</sup>

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Tillman v. Goodpasture*, 485 P.3d 656, 661 (Kan. 2021) (quoting *Arche v. U.S. Dep’t of the Army*, 798 P.2d 477, 480 (Kan. 1990)).

49. *Id.*

50. See Mark Lieber, *Surgical Sponges Left inside Woman for at Least 6 Years*, CNN (Feb. 21, 2018, 5:00 PM), <https://www.cnn.com/2018/02/21/health/surgical-sponges-left-inside-woman-study/index.html>.

### C. Right to Jury Trial & Right to Remedy

While the Seventh Amendment to the United States Constitution protects the right to a jury trial in the federal courts,<sup>51</sup> this right has not been incorporated, meaning it does not apply to the states under the Fourteenth Amendment's Due Process Clause.<sup>52</sup> Most states, however, have included the right to a civil jury trial in certain situations in their state constitutions.<sup>53</sup> Section 5 of the Kansas Bill of Rights states this right simply: "[t]he right of trial by jury shall be inviolate."<sup>54</sup> However, the Kansas Supreme Court has held that the section 5 right to a jury trial "applies no further than to give the right of such trial upon issues of fact so tried at common law."<sup>55</sup> This means that the right to a trial by jury applies only to those causes of action that existed at the time that the Kansas Constitution was adopted: 1859.<sup>56</sup> There is no federal right to a remedy by due course of law.<sup>57</sup> Many, though not all, states have included a right to remedy in their state constitutions.<sup>58</sup> Section 18 of the Kansas Bill of Rights states that "[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and

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51. U.S. CONST. amend. VII.

52. Renée Lettow Lerner & Suja A. Thomas, *The Seventh Amendment: Common Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-vii/interpretations/125> (last visited June 9, 2023). See generally Clayton LaForge, *Ripe for Incorporation: The Seventh Amendment and the Civil Jury Trial*, A.B.A. (Dec. 16, 2015), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2015/fall2015-1215-ripe-incorporation-seventh-amendment-civil-jury-trial/> (discussing *Gonzalez-Oyarzun v. Caribbean City Builders*, 798 F.3d 26 (1st Cir. 2015), in which the First Circuit reversed the District of Puerto Rico's holding that the Seventh Amendment applied to the states).

53. TAYLOR ASEN ET AL., POUND CIV. JUST. INST., STATE CONSTITUTIONAL PROVISIONS, STATUTES, COURT DECISIONS, AND SCHOLARSHIP ON TRIAL BY JURY AND THE RIGHT TO REMEDY (James E. Rooks, Jr. ed., 2018), <https://www.poundinstitute.org/wp-content/uploads/2019/04/state-constitutional-civil-justice-research-2018-1.pdf>.

54. KAN. CONST. Bill of Rights § 5. New Jersey, Pennsylvania, and New York, for example, include similar language; New Jersey adds a provision on how many jurors are required and all three states set the minimum percentage of jurors necessary to render a verdict. N.J. CONST. art. I, § 9; PA. CONST. art. I, § 6; N.Y. CONST. art. I, § 2.

55. *State v. Love*, 387 P.3d 820, 834 (Kan. 2017) (quoting *Hasty v. Pierpont*, 72 P.2d 69, 71 (Kan. 1937)).

56. *Tillman v. Goodpasture*, 485 P.3d 656, 659–60 (Kan. 2021).

57. See Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003).

58. *Id.* ASEN ET AL., *supra* note 53. Thirty-nine states have a right to remedy by due course of law. The eleven that do not are Alaska, Arizona, California, Hawaii, Iowa, Michigan, Nevada, New Jersey, New York, Virginia, and Washington. *Id.*



justice administered without delay.”<sup>59</sup> Like section 5, the right to a remedy in section 18 is qualified: the legislature is free to modify the common law as long as it provides an adequate substitute for any infringed or abolished right, but that protection does not extend to statutory changes to causes of action recognized after the adoption of the Kansas Constitution.<sup>60</sup> The Kansas legislature is free to abolish a common law cause of action that was not recognized in 1859, but rather entered into the common law after the Kansas Constitution was adopted.<sup>61</sup>

#### IV. COURT’S REASONING

##### A. *Majority*

The majority opinion in *Tillman v. Goodpasture* held that because the wrongful birth cause of action was a new cause of action that was distinct from a typical medical malpractice action, section 60-1906 did not implicate section 5 or section 18 of the Kansas Bill of Rights.<sup>62</sup> This holding was driven by the question of whether the *Arche* decision in 1990 created a new cause of action for wrongful birth or whether wrongful birth could function—and was intended by the court to function—under the traditional medical malpractice framework.<sup>63</sup>

The lower court, the Kansas Court of Appeals, affirmed the district court’s dismissal.<sup>64</sup> The panel explained why *Arche* created a new cause of action.<sup>65</sup> First, “*Arche* added elements not otherwise typically required to prove medical malpractice.”<sup>66</sup> Second, “the *Arche* court did not explicitly say wrongful birth was ‘a different application of the concept of

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59. KAN. CONST. Bill of Rights § 18. Pennsylvania and Delaware, for example, both include language providing a “remedy by due course of law” and state that “[a]ll courts shall be open.” PA. CONST. art. I, §11; DEL. CONST. art. I, § 9. New Mexico’s right to remedy is not found in its constitution, but rather created by judicial interpretation. *ASEN ET AL.*, *supra* note 53 at 40.

60. *Tillman*, 485 P.3d at 667–68.

61. *See id.*

62. *Id.* at 667 (“As with section 5, our conclusion that wrongful birth was recognized as a new cause of action in 1990 forecloses the parents’ claim that section 18 precludes the Legislature from statutorily abrogating the cause of action.”).

63. *Id.* at 661 (“The outcome for both constitutional questions is driven by whether this so-called ‘wrongful birth’ action should be considered a new cause of action as of 1990 when the *Arche* court confirmed its existence.”).

64. *Tillman v. Goodpasture*, 424 P.3d 540, 543 (Kan. Ct. App. 2018), *aff’d*, 485 P.3d 656 (Kan. 2021).

65. *Id.* at 546–47.

66. *Tillman*, 485 P.3d at 662 (citing *Tillman*, 424 P.3d at 546 (discussing how the *Arche* court added a handicap element to prove the new cause of action)).

negligence.”<sup>67</sup> Third, “the *Arche* majority did not expressly contradict the concurrence’s characterizations of wrongful birth as a ‘new’ tort.”<sup>68</sup> Fourth, and finally, “Kansas law in 1859 would have barred wrongful birth actions on public policy grounds.”<sup>69</sup>

The Kansas Supreme Court, on the other hand, employed a much simpler explanation for why *Arche* created a new cause of action: the construction of the wrongful birth cause of action “reveals a tort with non-traditional elements . . . [and] non-traditional damages limitations.”<sup>70</sup> While the foundation of wrongful birth is the basic tort of negligence, the majority stated that this is not enough to make wrongful birth a traditional tort.<sup>71</sup>

To support its holding, the court first looked to *Lemuz v. Fieser*,<sup>72</sup> which did not create a new tort.<sup>73</sup> The *Lemuz* court held that corporate negligence causes of action were applications of traditional negligence, not new causes of action.<sup>74</sup> The *Tillman* court contrasted corporate negligence with wrongful birth, indicating that wrongful birth “require[s] tailor-made rules for both liability and damages.”<sup>75</sup> *Arche* imposed a restriction on the cause of action to cases of severe and permanent handicap<sup>76</sup> and on the measure of damages to the expenses caused by the child’s handicap.<sup>77</sup> The majority found these restrictions to be “comparative differences” that distinguish wrongful birth from traditional medical malpractice, even though “wrongful birth actions may sound in medical malpractice.”<sup>78</sup>

The court further supported its conclusion that *Arche* created a new cause of action by turning to *Delaney v. Cade*,<sup>79</sup> another so-called “new”

67. *Id.* (quoting *Tillman*, 424 P.3d at 546–47).

68. *Id.* (citing *Tillman*, 424 P.3d at 547).

69. *Id.* (citing *Tillman*, 424 P.3d at 547).

70. *Id.*

71. *Id.* at 662–63.

72. 933 P.2d 134 (Kan. 1997).

73. *Tillman*, 485 P.3d at 663.

74. *Id.*; *Lemuz*, 933 P.2d at 142.

75. *Tillman*, 485 P.3d at 663.

76. *Id.* at 663–64 (*Arche* “established unique limiting circumstances for this cause of action not typically seen in medical malpractice actions by distinguishing this cause from claims that might have been based on less severe birth defects or even undesirable physical traits”).

77. *Id.* at 664 (“So despite the fact that this wrongful birth claim is premised on the argument that plaintiffs would not have become parents at all but for the physician’s negligence . . . [i]t is . . . reasonable to deny those normal and foreseeable costs which accrue to all parents.” (quoting *Arche v. U.S. Dep’t of the Army*, 798 P.2d 477, 481 (Kan. 1990))).

78. *Id.* at 665.

79. 873 P.2d 175 (Kan. 1994).

tort within medical malpractice.<sup>80</sup> What made the negligent aggravation of a preexisting injury or illness in *Delaney* different from traditional medical malpractice was a departure from standard negligence causation.<sup>81</sup> According to the majority, “[t]he wrongful birth cause of action is not much different.”<sup>82</sup>

The majority was further persuaded that *Arche* created a new tort because the Kansas statute prohibiting wrongful birth could have been enacted before *Arche* without violating the Kansas Constitution “because the cause of action had not been previously found to exist in Kansas.”<sup>83</sup> This conclusion formed the basis of the section 5 and section 18 analyses. The right to a jury trial protected by section 5 “is guaranteed in cases properly triable by jury before the adoption of the [Kansas] Constitution,”<sup>84</sup> and the section 18 right to a remedy by due course of law protects “civil causes of action that were recognized as justiciable by the common law as it existed at the time [the Kansas] constitution was adopted.”<sup>85</sup> To the majority, wrongful birth was a new cause of action, meaning it was neither “properly triable by jury” nor “recognized as justiciable” when the Kansas Constitution was adopted.<sup>86</sup> Because of this, the Kansas Supreme Court affirmed the district court’s grant of judgment on the pleadings to Goodpasture.<sup>87</sup>

#### *B. Justice Stegall’s Concurrence in Part, Dissent in Part*

Justice Stegall wrote separately to voice his thoughts on *Arche*, calling it “one of the worst decisions in [the] court’s history.”<sup>88</sup> Stegall suggested that *Tillman* should have been resolved by overruling *Arche*.<sup>89</sup> The issue with *Arche*, according to Justice Stegall, is not that the holding was based on a woman’s right to terminate her pregnancy, but that *Arche* “explicitly discriminates between ‘disabled’ and ‘normal’ unborn

80. *Tillman*, 485 P.3d at 665.

81. *Id.*; *Delaney*, 873 P.2d at 179.

82. *Tillman*, 485 P.3d at 665.

83. *Id.* This reasoning is mirrored in the application of section 5 and section 18 to only those wrongs recognized at the time of the adoption of the Kansas Constitution. See KAN. CONST. Bill of Rights §§ 5, 18.

84. *Tillman*, 485 P.3d at 665.

85. *Id.* at 668 (quoting *Lemuz v. Fieser*, 933 P.2d 134, 141 (Kan. 1997)).

86. *Id.* at 665, 668.

87. *Id.* at 668.

88. *Id.* (Stegall, J., concurring in part and dissenting in part).

89. *Id.* (“Even though *Arche* is no longer good law, it sits, *Korematsu*-like, as an ugly and as-yet unrepudiated black mark in our jurisprudential past.”) Justice Stegall is, of course, referring to *Korematsu v. United States*, which is described in dissent as “the legalization of racism.” 323 U.S. 214, 242 (1944) (Murphy, J., dissenting).

children.”<sup>90</sup> The suggestion here is that *Arche*, and a wrongful birth cause of action in general, could become a slippery slope toward “applied eugenics,”<sup>91</sup> which is problematic because the Kansas Supreme Court has held that the birth of a healthy child is never a compensable injury.<sup>92</sup>

Justice Stegall disagreed with the majority that *Arche* created a new cause of action.<sup>93</sup> “Indeed,” he stated, “the basic elements of the tort . . . are no different than any run-of-the-mill negligence action recognized at common law long before Kansas was a gleam in the American republic’s eye.”<sup>94</sup> He noted the variety of legal rules that apply to proving the four elements of a tort; sometimes the defendant did not actually owe the plaintiff a duty of care, sometimes the injury claimed is not recoverable, sometimes the causal connection is too remote, sometimes an affirmative defense is taken away, and sometimes different proof is required.<sup>95</sup> Stegall wrote, “[t]hese legal rules are susceptible to change . . . [b]ut each time one changes it does not create a ‘new’ cause of action.”<sup>96</sup>

Justice Stegall also disagreed with the majority’s interpretation of section 18 and stated that he “would do away entirely with the judicially created amber tomb that section 18 has become,” and would instead adopt an understanding of section 18 that provides a remedy at law for the “wrongs . . . recognized by the law of the land.”<sup>97</sup>

### C. Chief Justice Luckert’s Dissent

Chief Justice Luckert’s view is that section 60-1906 violates section 5 of the Kansas Bill of Rights and is thus unconstitutional.<sup>98</sup> Luckert disagreed that “wrongful birth action is a separate cause of action not known at common law and therefore not within the protection of section 5 of the Kansas Constitution Bill of Rights.”<sup>99</sup> In her view, the four elements of medical malpractice—duty owed by the medical professional

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90. *Tillman*, 485 P.3d at 668–69 (Stegall, J., concurring in part and dissenting in part). In this Author’s opinion, the fact that Justice Stegall uses the term “unborn children” as opposed to “fetuses” or even just “the unborn” perhaps belies his true disagreement with *Arche*.

91. *Id.* at 669 (citing Daniel W. Whitney & Kenneth N. Rosenbaum, *Recovery of Damages for Wrongful Birth*, 32 J. LEGAL MED. 167, 171 (2011)) (“Who gets to decide which traits count as undesirable enough for the law to recognize the lost chance to abort as a true injury?”).

92. *Id.*; *Byrd v. Wesley Med. Cntr.*, 699 P.2d 459, 468 (Kan. 1985).

93. *Tillman*, 485 P.3d at 670 (Stegall, J., concurring in part and dissenting in part).

94. *Id.*

95. *Id.* at 670–71.

96. *Id.* at 671.

97. *Id.* at 672.

98. *Id.* (Luckert, C.J., dissenting).

99. *Id.*

to the patient, breach of that duty, injury to the patient, and the breach being the proximate cause of the injury—sufficiently cover the claim put forth by Tillman and Fleetwood.<sup>100</sup> She argued the plaintiffs did not bring a separate wrongful birth action, rather, they brought “a classic medical malpractice action.”<sup>101</sup> Luckert read *Arche* as recognizing wrongful birth as a form of medical malpractice, not an altogether new tort.<sup>102</sup>

The section 5 analysis—and indeed the section 18 analysis then—is much different than that of the majority.<sup>103</sup> Because medical malpractice existed before the adoption of the Kansas Constitution, section 5 of the Kansas Bill of Rights should apply, and Tillman and Fleetwood’s right to a jury trial should be protected.<sup>104</sup> Justice Luckert would reverse the judgments of the court of appeals and the district court and hold that section 60-1906 violates section 5.<sup>105</sup>

#### *D. Justice Rosen’s Dissent*

Justice Rosen joined Chief Justice Luckert’s dissent, but wrote separately to examine section 18 of the Kansas Bill of Rights.<sup>106</sup> Rosen questioned whether the section 18 test applied by the majority—whether the cause of action existed before the Kansas Constitution was adopted in 1859—was the proper one to use.<sup>107</sup> The distinction between an injury and something that the people of Kansas considered to be an injury in 1859 is well-founded in the case law, Rosen admitted, but he suggested that perhaps the question the court should ask is the former: whether the plaintiffs suffered an injury.<sup>108</sup>

Like both Stegall and Luckert, Rosen viewed wrongful birth as a medical malpractice claim, stating that “as a medical negligence claim, the common law explicitly recognized this action and has done so for

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100. *Id.* Chief Justice Luckert stated that Tillman and Fleetwood “allege[d] a physician owed them both duties—to perform within the physician’s standard of care when reading the sonogram and in providing them full knowledge of a risk and the alternatives . . . [and] that Dr. Goodpasture breached both duties.” *Id.*

101. *Id.*

102. *Id.* at 673.

103. *Id.* at 675.

104. *Id.* Luckert only discussed the section 5 right to jury trial and stated that because she reached the conclusion that the statute violates section 5, she “need not reach the question of whether the statute violates section 18 of the Kansas Constitution Bill of Rights.” *Id.*

105. *Id.*

106. *Id.* (Rosen, J., dissenting). Chief Justice Luckert did not examine section 18 in her dissent, in which Rosen joined. *Id.*

107. *Id.*

108. *Id.*

centuries.”<sup>109</sup> Where the majority cited nontraditional elements of the wrongful birth cause of action, Rosen “agree[d] that these constructs impose contours on a medical negligence suit, [but stated that] they have not created a new cause of action.”<sup>110</sup> Statutes of limitation and caps on damages function in a similar way, yet new torts are not created with every differing statute of limitations or amount or type of damages permitted.<sup>111</sup> These contours, then, should not “negate the conclusion that the plaintiffs’ general allegations of duty, breach, and causation would have given rise to suit in 1859.”<sup>112</sup>

## V. ANALYSIS & IMPLICATIONS

### A. *Untangling Tillman from the Right to Life*

Judges make decisions based on the morals of the people.<sup>113</sup> Their task is to “discover the results of other people’s moral reasoning—the moral reasoning of the framers of the Constitution or the moral reasoning of legislators or the moral reasoning of earlier generations of judges—and to apply those results to the cases that come before them.”<sup>114</sup> But sometimes there is dissensus among the public about what morality requires, which certainly makes for a less straightforward decision-making process.<sup>115</sup> One of these contentious issues is abortion.<sup>116</sup>

Even though *Tillman v. Goodpasture* is not explicitly about abortion, framing the injury as “the lost chance to abort”<sup>117</sup> makes it an abortion issue in the eyes of abortion opponents.<sup>118</sup> Kansas Attorney General

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109. *Id.* at 676 (“In contrast, the common law in 1859 did not explicitly bar the action the plaintiffs have brought here.”).

110. *Id.* at 677. “Rather,” Rosen continued, “they have placed limits on an existing one.” *Id.*

111. *Id.*

112. *Id.* at 678.

113. Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT’L. J. CONST. L. 2, 2 (2009) (“In the debate about the desirability of judicial review, it is sometimes said that courts are better at moral reasoning than legislatures are, and that this is one of the reasons we should entrust them with final authority over certain essentially moral issues of individual and minority rights.”); see also Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, in MORAL JUDGEMENT AND DECISION MAKING 101, 102 (Dan Bartels et al., eds., 2009) (“At a minimum, the law prescribes and proscribes morally laden behaviors, but it also unabashedly attempts to shape moral attitudes and beliefs.”).

114. Waldron, *supra* note 113, at 9.

115. Bilz & Nadler, *supra* note 113, at 107. The authors here consider abortion, same-sex marriage, and the death penalty as three such issues. *Id.*

116. *Id.*

117. *Tillman*, 485 P.3d at 669 (Stegall, J., concurring in part and dissenting in part).

118. See Luke Isaac Haqq, *Reconsidering Wrongful Birth*, 95 NOTRE DAME L. REV. REFLECTION 177, 182, 189 (2020) (arguing that while wrongful birth was not initially a

Derek Schmidt released a statement on the *Tillman* decision, stating: “I am pleased we have successfully defended this important statute enacted by the Legislature. In Kansas, the birth of a child should be cause for celebration, not for the law to award damages because the child was ‘wrongfully’ born.”<sup>119</sup> He did not mention sections 5 or 18 of the Kansas Bill of Rights, nor the Kansas Constitution.<sup>120</sup> He did not mention *Tillman* and Fleetwood’s baby girl, who will require a lifetime of expensive care.<sup>121</sup> Justice Stegall, too, spent much time on the rights of the unborn in his concurrence in part and dissent in part.<sup>122</sup> Despite his claim that the wrongful birth cause of action established in *Arche* is “wholly independent of the controversies and disagreements surrounding abortion,” Stegall’s opinion certainly has a pro-life flair.<sup>123</sup>

Wrongful birth and the prenatal torts bring up a bit of a *Michael H.*<sup>124</sup> dilemma: the narrower conception of the cause of action is at odds with the right to life, while a broader conception of it might bring into focus a purpose of the cause of action that is wholly child-centered. As in *Michael H.*, the language is important. Defining wrongful birth as the lost chance to abort a child paradoxically shifts the focus *away* from the child and the medical care expenses her parents cannot afford.<sup>125</sup> The language poisons

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major concern to pro-life groups, Christian organizations should now focus on the prenatal torts at the state level instead of continually trying to influence federal abortion law).

119. Press Release, Kansas Attorney General, AG Derek Schmidt Statement on Kansas Supreme Court Decision Upholding Statute Abolishing ‘Wrongful Birth’ Claims (Apr. 30, 2021) [hereinafter *Tillman* Press Release], <https://www.ag.ks.gov/media-center/news-releases/2021-news-releases/2021/04/30/ag-derek-schmidt-statement-on-kansas-supreme-court-decision-upholding-statute-abolishing-wrongful-birth-claims> [<https://web.archive.org/web/20210715081823/https://www.ag.ks.gov/media-center/news-releases/2021-news-releases/2021/04/30/ag-derek-schmidt-statement-on-kansas-supreme-court-decision-upholding-statute-abolishing-wrongful-birth-claims>].

120. *Id.*

121. *Id.*; see *Tillman*, 485 P.3d at 660.

122. *Tillman*, 485 P.3d at 668–69 (Stegall, J., concurring in part and dissenting in part).

123. *Id.* at 669. Justice Stegall states that *Arche* “explicitly discriminates between ‘disabled’ and ‘normal’ unborn children.” *Id.* (emphasis added). He also makes the slippery slope argument of “[w]hat if the mother had wanted a boy rather than a girl? What if she did not want a child with Down’s syndrome?” *Id.*

124. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion). Justice Scalia defined the right at stake as the parental rights of an “adulterous natural father.” *Id.* at 130. The plurality did not ask whether parenthood had been afforded the Court’s attention and protection, but whether “a natural father’s relationship with a child whose mother is married to another man” had been protected. *Id.* at 139 (Brennan, J., dissenting).

125. See Haley Hermanson, Note, *The Right Recovery for Wrongful Birth*, 67 DRAKE L. REV. 513, 534–45 (2019), for an explanation of the types of damages that may be appropriate in wrongful birth cases, including: extraordinary child-rearing costs, ordinary child-rearing costs, post-majority expenses, extraordinary parental care, and damages for emotional distress and loss of consortium. Not all states that allow wrongful birth claims, whether as a separate claim or as medical malpractice, allow all these damages. *Id.*

the good that such a cause of action can do. If parents brought a medication error claim on behalf of their child who was negligently prescribed the wrong medication by a doctor or negligently administered the wrong medication by a nurse,<sup>126</sup> would we take issue with the child's parents seeking damages to cover the cost of medical care for that sick child?<sup>127</sup> In the birth injury context, if a new mother brought a medical negligence claim against her obstetrician for the failure to order a cesarean section, would we take issue with her seeking damages to support her child who suffered a brain injury as a result of lack of oxygen during the birth?<sup>128</sup> Women who bring wrongful birth claims have been condemned by courts, the media, scholars, and even the jurors serving on their cases.<sup>129</sup> While "[p]laintiff-mothers are neither the architects of wrongful birth standards nor the coiners of the claim's troubling name," they bear the brunt of the outcry.<sup>130</sup> And as much as "[n]o one wants to state out loud, 'I would have chosen to abort my child,'" stating just that "is often the only way for a parent to seek legal recourse."<sup>131</sup>

In 2019, the Kansas Supreme Court secured the right to abortion in Kansas, even in the event that the United States Supreme Court overturned *Roe v. Wade*.<sup>132</sup> In *Hodes & Nauser*, the "6-1 majority rejected the state's arguments that there is no protection for abortion rights because most abortions were illegal in Kansas Territory when the state constitution was written in 1859."<sup>133</sup> *Hodes & Nauser* cemented the right of a woman in Kansas to make decisions about her body,<sup>134</sup> yet just two

126. *Common Types of Medical Malpractice*, *supra* note 40.

127. See Sarah Boseley, *Children Given Wrong Drug Doses*, *GUARDIAN* (Jan. 18, 2010, 7:05 PM), <https://www.theguardian.com/society/2010/jan/19/children-given-wrong-prescriptions-hospital> ("Hospital doctors make mistakes in more than one in 10 prescriptions they write for children, far more than was previously thought . . .").

128. See *Birth Injuries from Delayed C-Section*, *BIRTH INJURY HELP CTR.*, <https://www.birthinjuryhelpcenter.org/c-section-birth-injury.html> (last visited June 9, 2023) ("Failure to schedule a c-section or negligent delay in performing an emergency c-section is strongly linked as the cause of many brain injuries.").

129. Sofia Yakren, *"Wrongful Birth" Claims and the Paradox of Parenting a Child with a Disability*, 87 *FORDHAM L. REV.* 583, 593–602 (2018).

130. *Id.* at 594.

131. Kathy Lohr, *Should Parents Be Able to Sue for 'Wrongful Birth'?*, *NPR* (May 15, 2012), <https://www.npr.org/sections/health-shots/2012/05/15/152687638/should-parents-be-able-to-sue-for-wrongful-birth> (quoting Kari Ann Rinker of the Kansas chapter of the National Organization for Women).

132. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 501 (Kan. 2019) (per curiam); see *supra* notes 37–38 and accompanying text.

133. Hanna, *supra* note 38.

134. Richard E. Levy, *Constitutional Rights in Kansas after Hodes & Nauser*, 68 *U. KAN. L. REV.* 743, 743 ("[T]he Kansas Supreme Court held that section 1 of the Kansas Constitution's Bill of Rights protects a woman's fundamental right 'to make her own



terms later the court reversed course and held that a “doctor’s negligence [which] deprive[s] [a woman] of her right to make an informed decision about her options” does not rise to the level of constitutional protection.<sup>135</sup> While then-Kansas Attorney General Derek Schmidt voiced his satisfaction with the end result in *Tillman*,<sup>136</sup> he was not pleased with the court’s decision in *Hodes & Nauser* and appealed.<sup>137</sup> In reaction to the *Hodes & Nauser* decision, the Kansas legislature proposed an amendment to the Kansas Constitution that was rejected in an “unexpected landslide” in August 2022.<sup>138</sup>

It is a difficult task to remove the *Tillman* decision from its context. Even though the holding is more abortion-adjacent than abortion-centered, the underlying truth of a wrongful birth claim is that it “forces parents to testify about their injury in terms of the very existence of their child,” requiring that they claim that would have terminated had they known about the disability.<sup>139</sup> Those that make the statement that they lost the chance to terminate “are the subjects of significant, sometimes public, external blame for taking legally required controversial positions about their children to obtain necessary caretaking resources.”<sup>140</sup> The goal of a wrongful birth claim is to obtain the caretaking resources necessary to provide for the child.<sup>141</sup> But because abortion is built into a wrongful birth cause of action, a controversy exists.

### *B. Wrongful Birth as Medical Malpractice*

All medical malpractice claims consist of four elements: (1) the medical professional owed a legal duty of care to the patient; (2) the

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decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy.” (quoting *Hodes*, 440 P.3d at 466)).

135. *Tillman v. Goodpasture*, 485 P.3d 656, 660 (Kan. 2021).

136. *Tillman* Press Release, *supra* note 119.

137. See Press Release, Kansas Attorney General, AG Derek Schmidt Files Appeal in *Hodes & Nauser v. Schmidt* (July 7, 2021) <https://ag.ks.gov/media-center/news-releases/2021/07/07/ag-derek-schmidt-files-appeal-in-hodes-nauser-v.-schmidt> [<https://web.archive.org/web/20210707211729/https://ag.ks.gov/media-center/news-releases/2021/07/07/ag-derek-schmidt-files-appeal-in-hodes-nauser-v.-schmidt>].

138. *Id.*; Sherman Smith & Lily O’Shea Becker, *Kansas Voters Defeat Abortion Amendment in Unexpected Landslide*, KAN. REFLECTOR (Aug. 2, 2022, 9:38 PM), <https://kansasreflector.com/2022/08/02/kansas-voters-defeat-abortion-amendment-in-unexpected-landslide-1/>; Dylan Lysen et al., *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment>.

139. Yakren, *supra* note 129, at 587; *Tillman*, 485 P.3d at 660.

140. Yakren, *supra* note 129, at 602.

141. *Id.* at 601.

medical professional breached this duty of care; (3) the patient was injured; and (4) the breach by the medical professional proximately caused the patient's injury.<sup>142</sup> Medical malpractice is not a modern notion; "[t]he concept of holding a physician accountable for medical malpractice is grounded in ancient law."<sup>143</sup> Modern medical negligence law "has evolved after the principles of English common law, modified and changed by numerous court decisions and legislative statutes that vary from one state to another."<sup>144</sup> Indeed, medical malpractice actions vary quite a bit and "[t]he exact nature of the duty and the mechanism of a breach may vary case to case."<sup>145</sup>

What the *Tillman* dissents got right about wrongful birth is that it is not as different from traditional medical malpractice as the majority suggests.<sup>146</sup> Chief Justice Luckert says that *Tillman* and Fleetwood "allege a physician owed them [two] duties—to perform within the physician's standard of care when reading the sonogram and in providing them full knowledge of a risk and the alternatives. And they also allege that Dr. Goodpasture breached both duties. They bring a classic medical malpractice action."<sup>147</sup> Justice Rosen states that the limits imposed on wrongful birth "impose contours on a medical negligence suit" but do not create a wholly new cause of action.<sup>148</sup> Even Justice Stegall indicates that legal rules surrounding negligence claims can change, but a new cause of action is not created every time this happens.<sup>149</sup>

Examining a different type of medical malpractice—one that is not considered a distinct cause of action<sup>150</sup>—provides a helpful comparison. In September 1906, anesthesia was administered for the first time at the

142. *Tillman*, 485 P.3d at 672 (Luckert, C.J., dissenting). The elements of medical malpractice are also stated as:

(1) the existence of a legal duty on the part of the doctor to provide care or treatment to the patient; (2) a breach of this duty by a failure of the treating doctor to adhere to the standards of the profession; (3) a causal relationship between such breach of duty and injury to the patient; and (4) the existence of damages that flow from the injury such that the legal system can provide redress.

B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPEDICS & RELATED RSCH. 339, 342 (2009).

143. Bal, *supra* note 142, at 346.

144. *Id.*

145. *Tillman*, 485 P.3d at 672 (Luckert, C.J., dissenting).

146. See generally Levy, *supra* note 134, at 787 n.283. Levy states that if the Kansas Supreme Court treated wrongful birth as medical malpractice, the statute might implicate section 18, which would trigger strict scrutiny instead of rational basis review. *Id.*

147. *Tillman*, 485 P.3d at 672 (Luckert, C.J., dissenting).

148. *Id.* at 677 (Rosen, J., dissenting).

149. *Id.* at 670–71 (Stegall, J., concurring in part and dissenting in part).

150. See *Wentling v. Med. Anesthesia Servs., P.A.*, 701 P.2d 939, 940 (Kan. 1985); see also *Funke v. Fieldman*, 512 P.2d 539, 542 (Kan. 1973).

Eleanor Taylor Bell Memorial Hospital, which is now the University of Kansas Hospital.<sup>151</sup> Sixty years earlier, William T. G. Morton publicly and successfully demonstrated the use of anesthesia for surgery at “[t]he Ether Dome” at Massachusetts General Hospital.<sup>152</sup> He was the first to do so.<sup>153</sup> Absent a very deep dive into Kansas medical records from the years between 1846 and 1859, it would appear that surgical anesthetic was not in common use in Kansas at the time the Kansas Constitution was adopted. But anesthesia errors are not a separate cause of action from medical malpractice.<sup>154</sup> They are widely accepted as medical malpractice<sup>155</sup> and indeed accepted in Kansas as medical malpractice.<sup>156</sup>

It is hard to imagine the Kansas legislature deciding to abolish the anesthesia error cause of action or the Kansas Supreme Court holding that a cases like *Wentling v. Medical Anesthesia Services P.A.* or *Funke v. Fielding* created a new cause of action for anesthesia errors that was separate from typical medical malpractice. This is because anesthesia is generally not thought of as controversial.<sup>157</sup> But anesthesia errors and the prenatal torts are not analogous. Abortion is controversial. While wrongful birth could easily operate under the broader medical malpractice cause of action,<sup>158</sup> there is more at play than in other types of medical malpractice.

151. *Anesthesiology: History of Department*, UNIV. KAN. MED. CTR., <https://www.kumc.edu/school-of-medicine/academics/departments/anesthesiology/about/history-of-department.html> (last visited May 22, 2023).

152. *History of Anesthesia, 1846*, WOOD LIBR.-MUSEUM OF ANESTHESIOLOGY, <https://www.woodlibrarymuseum.org/history-of-anesthesia/#1846> (last visited June 9, 2023).

153. *Id.* As an interesting side note, Dr. Oliver Wendell Holmes, Sr., father of the late U.S. Supreme Court Justice, suggested the terms “anaesthetic” and “anaesthesia” to Morton in a letter. *Id.*

154. *Wentling*, 701 P.2d at 940 (“This is a wrongful death action based upon defendant’s medical malpractice in improperly administering a spinal anesthetic to plaintiff’s decedent.”); *Funke*, 512 P.2d at 542 (“This is an action for malpractice against a physician anesthesiologist to recover for injuries sustained as the result of the administration of a spinal anesthetic alleged to have been negligently performed.”).

155. See *Common Types of Medical Malpractice*, *supra* note 40.

156. See *Wentling*, 701 P.2d at 940; *Funke*, 512 P.2d at 542.

157. See *General Anesthesia*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/anesthesia/about/pac-20384568> (last visited June 9, 2023). Common side effects are nausea, dry mouth, hoarseness, sleepiness, and confusion. *Id.*; Tim Newman, *What to Know About General Anesthesia*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/265592> (Nov. 29, 2021). Death from anesthesia is rare, occurring in one of every 100,000 cases. *Id.*

158. See *Tillman v. Goodpasture*, 485 P.3d 656, 671 (Stegall, J., concurring in part and dissenting in part); *id.* at 672–73 (Luckert, C.J., dissenting); *id.* at 677–78 (Rosen, J. dissenting).

### C. Section 5 and Section 18 Implications

The majority's reading of section 5 and section 18 means the Kansas common law is stuck with only those causes of actions that were recognized in 1859.<sup>159</sup> If, for example, a cause of action was first recognized in 1860, and was subsequently recognized in the common law year after year from 1860 to 2021, the Kansas legislature could still pass a law to abolish it in 2023 without implicating section 5 or section 18.<sup>160</sup> To continue the example of anesthesia errors, if the Kansas Supreme Court held that anesthesia errors were actually a new cause of action adopted into the common law after 1859, the Kansas legislature could pass a law that would abolish the anesthesia error cause of action entirely, and it would be perfectly constitutional.

The *Tillman* holding means that the Kansas legislature and courts can arbitrarily draw a line between what is a recognized tort and what is a so-called "new" cause of action. Judges already wield the power to define the morals of a state.<sup>161</sup> This holding gives them additional power, especially in areas of disagreement about what morality requires.<sup>162</sup> And little room is left for changes in technology and advancements, which are at the mercy of the legislature to either protect or proscribe (or perhaps protect and later proscribe).

## VI. CONCLUSION

Wrongful birth claims, in Kansas and elsewhere, should be brought as typical medical negligence claims. The *Tillman* majority incorrectly held that *Arche* created a new cause of action and then used a rigid application of section 5 and section 18 to uphold the section 60-1906 abolition of it. The *Tillman* majority employed a sort of legal gymnastics to come to a holding that pleases the Kansas legislature. The court held that the "non-traditional elements" and "non-traditional damages limitations" involved in the tort of wrongful birth set it apart as a new cause of action, established by *Arche*.<sup>163</sup> And because it is a new cause of action, and thus not one the state recognized at the time of the adoption of the Kansas Constitution in 1859, it is not within the limited protection

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159. See *id.* at 665 (majority opinion) ("This jury trial right is guaranteed in cases properly triable by jury before the adoption of the Constitution."); *id.* at 667 ("But under our present caselaw, section 18 curtails that flexibility [of the Legislature to modify the common law] for claims that existed at common law when our Constitution was adopted.").

160. See *id.* at 667–68.

161. See generally Waldron, *supra* note 113.

162. See Bilz & Nadler, *supra* note 113, at 107.

163. *Tillman*, 485 P.3d at 662.

of section 5 or section 18 of the Kansas Bill of Rights. The easier and more logical answer is, of course, holding that wrongful birth is a type of medical malpractice, but allowing the legislature to limit damages or limit its application.<sup>164</sup>

When Arizona was considering a similar prohibition on wrongful birth suits, the state senator championing the bill called it “a pro-life bill on every account.”<sup>165</sup> States, especially those like Kansas that have protected abortion rights beyond *Roe v. Wade*, should not “turn medical malpractice cases into a fight over abortion.”<sup>166</sup>

A Kansas article published after the case was decided says it best: Tillman and Fleetwood’s attorney, Lynn Johnson, “argued Kansans shouldn’t be locked out from holding a doctor accountable for negligence just because the Legislature ‘doesn’t like abortion.’”<sup>167</sup> In *Tillman v. Goodpasture*, the Kansas Supreme Court did just that.

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164. See *id.* at 667 (“[T]he court looks to insure that due process requirements are met and, when a common-law remedy is modified or abolished, an adequate substitute remedy must be provided to replace it.” (quoting *Kansas Malpractice Victims Coal. v. Bell*, 757 P.2d 251, 260 (Kan. 1988) (citation omitted))).

165. Lohr, *supra* note 131.

166. *Id.*

167. Carpenter, *supra* note 35.

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