

No Static Solution: Does the Kansas Constitution Protect an Evolving Common Law? [Tillman v. Goodpasture, 313 Kan. 278 (2021)]

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I. INTRODUCTION

In *Tillman v. Goodpasture*,¹ the Kansas Supreme Court found that Sections 5 and 18 of the Bill of Rights of the Kansas Constitution, which guarantee the right to a trial by jury and the right to justice without delay, do not guarantee the ability to sue for the tort of "wrongful birth."² The Court reasoned that because the tort of wrongful birth was not available at common law when the Kansas Constitution was ratified, the Kansas Constitution does not guarantee rights under that claim.³ Although the tort of wrongful birth would not exist without a corresponding right to abortion, this decision is not defined by its connection to abortion rights. This Comment argues that both Section 5's and Section 18's guarantees should apply to torts that developed in the years since ratification rather than be fixed to protect a set of claims defined only by a somewhat arbitrary point in time.

II. BACKGROUND

A. Case Description

Alysia R. Tillman and Storm Fleetwood's daughter, while still in utero, was "diagnosed with schizencephaly⁴ and [was] alleged to be severely and

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

2. *Id.* at 667.

3. *Id.*

4. "Schizencephaly is a rare congenital . . . brain malformation in which abnormal slits or clefts form in the cerebral hemispheres of the brain." *Schizencephaly*, GENETIC & RARE DISEASES INFO. CTR. (emphasis added), <https://rarediseases.info.nih.gov/diseases/166/disease#1652> [<https://perma.cc/X4D8-E44C>] (last visited Oct 5, 2022). Symptoms vary depending on the severity of the disease, but "include

permanently neurologically, cognitively, and physically handicapped."⁵ Tillman and Fleetwood sued their physician, Dr. Katherine A. Goodpasture, alleging that she "failed to diagnose severe structural abnormalities and defects in the fetus' brain," which deprived them of the ability to make an informed decision as to whether or not to terminate the pregnancy.⁶ Tillman and Fleetwood's daughter was born without the ability to "perform the activities of daily living."⁷

B. Legal Background

1. Section 5 – The Right to Trial by Jury in the Kansas Constitution

Section 5 of the Bill of Rights of the Kansas Constitution says: "The right of trial by jury shall be inviolate."⁸ The Court has interpreted Section 5 as broader than a mere guarantee of the right to have a jury impaneled; it means that Kansas citizens have the right to have their claims considered by a jury of their peers, and to have a jury determine the damages for those claims.⁹ In *Hilburn v. Enerpipe Ltd.*, the Court maintained that Section 5 only protects the right to jury trial "as it historically existed at common law when [the Kansas] constitution came into existence" – that is, it only protects those causes of action that a jury could have heard when the Kansas Constitution was adopted in 1859.¹⁰ The Kansas Supreme Court has found several statutes unconstitutional because of Section 5, including, in *Hilburn*, K.S.A. § 60-19a02's cap on non-economic damages in personal injury cases.¹¹

2. Section 18 – An Injured Person's Right to a Remedy

Section 18 of the Bill of Rights of the Kansas Constitution says: "All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay."¹² The Kansas Supreme Court has held that Section 18 "guarantees the right

developmental delay, seizures, and problems with brain-spinal cord communication," in addition to "intellectual disability [and] partial or complete paralysis." *Id.* (emphasis added).

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

6. *Id.*

7. Katie Bernard, *Kansas Couple Asks State Supreme Court to Void 2013 Law Barring Wrongful Birth Lawsuits*, KAN. CITY STAR (Sep. 15, 2020, 5:16 PM), <https://www.kansascity.com/news/politics-government/article245758720.html> [<https://perma.cc/GF5R-FVEZ>].

8. KAN. CONST. Bill of Rts. § 5.

9. *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 513 (Kan. 2019).

10. *Id.* (quoting *Miller v. Johnson*, 289 P.3d 1098, 1108 (Kan. 2012), *abrogated by Hilburn*, 442 P.3d at 517–18).

11. *Id.* at 514; *see also* *State v. Arnett*, 496 P.3d 928, 937–38 (Kan. 2021).

12. KAN. CONST. Bill of Rts. § 18.

to a remedy."¹³ It has additionally determined that like Section 5, Section 18 only provides a guarantee for causes of action available at common law when Kansas adopted its constitution.¹⁴ Ultimately, Section 18 restricts the Legislature's ability to decrease the available remedies for those causes of action.¹⁵

3. "Quid Pro Quo"

In the late 1980s, the Kansas Legislature and the Kansas Supreme Court began struggling to define the boundaries Sections 5 and 18 placed on the Legislature's attempts at tort reform.¹⁶ In *Kansas Malpractice Victims Coalition v. Bell*,¹⁷ the Court held that a 1986 legislative cap of \$250,000 on non-economic losses and \$1 million on total losses violated Sections 5 and 18, in part because the cap left plaintiffs with no alternative remedy.¹⁸ However, in *Samsel v. Wheeler Transport Services, Inc.*,¹⁹ the Court held that the Legislature could limit damages as long as the limiting statute provided a sufficient "substitute remedy," or "quid pro quo."²⁰ Kansas courts began applying this "quid pro quo" analysis to both Section 5 and Section 18 analyses.²¹ Under this test, the Legislature could supplant the common law remedy as long as it provided a sufficient replacement.²²

In the 2019 case *Hilburn v. Enerpipe Ltd.*, the Kansas Supreme Court shifted course and held that the word "inviolate" in Section 5 means that the Legislature cannot limit the jury, even if it provides an alternative remedy.²³ Although the quid pro quo test had previously been applied to both Section 5 and Section 18, the Court in *Hilburn* determined that Sections 5 and 18 are "distinct in every conceivable dimension They share no language; they share no drafting rationale . . . they articulate different concepts aimed to achieve different purposes, and thus merit unique analyses."²⁴

4. The Supreme Court of Kansas Recognized the Tort of Wrongful Birth

13. *Miller*, 289 P.3d at 1113.
14. *Lemuz v. Fieser*, 933 P.2d 134, 142 (Kan. 1997); *see also Tillman*, 424 P.3d at 549.
15. *Hanson v. Krehbiel*, 75 P. 1041, 1043 (Kan. 1904).
16. *See Bruce Keplinger & Scott M. Adam, Our Statutory System for Actual Damages in Tort: Kansas in Wonderland?*, J. KAN. BAR ASS'N 18, 19–21 (Jan. 1994).
17. *Kansas Malpractice Victims Coal. v. Bell*, 757 P.2d 251 (Kan. 1988), *abrogated by Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019).
18. *Keplinger & Adam, supra* note 16, at 19–20.
19. *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990), *abrogated by Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019).
20. *Keplinger & Adam, supra* note 16, at 20.
21. *See e.g., Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012).
22. *See Bair v. Peck*, 811 P.2d 1176, 1188 (Kan. 1991).
23. *Hilburn*, 442 P.3d at 515.
24. *Id.* at 521.

in 1990

After *Roe v. Wade*, a wave of tort cases emerged in which the plaintiffs claimed that a physician's negligence infringed on their right to terminate a pregnancy.²⁵ These malpractice torts came to be classified into several types, including wrongful pregnancy and wrongful birth.²⁶ These classifications define the scope of recovery available for harms resulting from a physician's negligence.²⁷ In a wrongful pregnancy suit, plaintiffs can obtain damages for costs associated with pregnancy and childbirth, but not for any costs that occur after the birth of the child.²⁸

A wrongful birth suit, however, seeks damages for costs associated with the life of the child after birth.²⁹ In 1990, the Kansas Supreme Court recognized the tort of wrongful birth in *Arche v. United States*, in the context of children who are born "severely and permanently handicapped."³⁰ The Court defined a severely handicapped child as one possessing "such gross deformities, not medically correctable, that the child will never be able to function as a normal human being."³¹ The Court held that plaintiffs could recover the costs of raising the handicapped child, should they exceed the costs of raising a child without such disability—but plaintiffs could not recover for emotional distress, and the costs paid would extend only to the child's age of majority.³²

5. The Kansas Legislature Banned the Tort of Wrongful Birth in 2013

In 2013, the Kansas Legislature enacted K.S.A. § 60-1906 and banned "any civil action for any physical condition of a minor that existed at the time of such minor's birth if the damages sought [arose] out of a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion."³³ Proponents argued that this ban on the tort of wrongful birth protected the rights of unborn children, while opponents

25. Barbara Pfeffer Billauer, *Re-Birthing Wrongful Birth Claims in the Age of IVF and Abortion Reforms*, 50 STETSON L. REV. 85, 93–94 (2020).

26. *Id.*; see also *Arche v. United States*, 798 P.2d 477, 478 (Kan. 1990).

27. Billauer, *supra* note 25, at 94–95.

28. *Arche*, 798 P.2d at 478.

29. Haley Hermanson, Note, *The Right Recovery for Wrongful Birth*, 67 DRAKE L. REV. 513, 520–22 (2019) ("Wrongful birth is a cause of action brought by the parents of a disabled child, claiming they would have avoided conception or elected to terminate an existing pregnancy through abortion but for the negligence of those responsible for prenatal testing, counseling of risks, or disclosure of abnormalities or defects."); see also *Arche*, 798 P.2d at 479.

30. *Arche*, 798 P.2d at 480.

31. *Id.* at 481.

32. *Id.* at 481–82, 487.

33. KAN. STAT. ANN. § 60-1906.

argued that it could excuse physicians from informing pregnant women of potential birth defects.³⁴

Tillman and Fleetwood argued that K.S.A. § 60-1906, which superseded the Kansas Supreme Court's decision in *Arche* and thus prevented Kansas courts from awarding damages for claims of wrongful birth, violated their rights under both Sections 5 and 18 of the Kansas Constitution.³⁵

III. COURT DECISION

A. *The Lower Courts Upheld the Constitutionality of K.S.A. § 60-1906, and the Kansas Supreme Court Affirmed*

The Riley County District Court held that Tillman and Fleetwood's "wrongful birth" suit was barred by K.S.A. § 60-1906, and the Court of Appeals affirmed.³⁶ Both courts determined the statute was constitutional.³⁷ Crucially, they held that wrongful birth could not be classified as a subcategory of negligence, and that *Arche* had only just established wrongful birth as a tort in Kansas in 1990.³⁸ Therefore, the courts determined, Section 5 did not protect a Kansas citizen's right to the claim.³⁹ The Court of Appeals also held that based on its interpretation of Kansas Supreme Court precedent, Section 18,⁴⁰ like Section 5, "only applies to causes of action existing at common law when the Kansas Constitution was adopted."⁴¹ Thus, Section 18, like Section 5, offers no protection to any tort developed after ratification.⁴² The Kansas Supreme Court affirmed the rulings of the Court of Appeals and the District Court in a narrow 4-3 decision.⁴³

34. Scott Rothschild, *Petitions Delivered Urging Brownback to Veto Anti-Abortion Measures*, LAWRENCE J. WORLD (Apr. 9, 2013, 1:54 PM), <https://www2.ljworld.com/news/2013/apr/09/petitions-delivered-urging-brownback-veto-anti-abo/> [<https://perma.cc/M4EC-8SN4>].

35. *Tillman*, 424 P.3d at 543–44.

36. *Tillman*, 485 P.3d at 660.

37. *Id.*

38. *Id.*

39. *Id.* The Court of Appeals also decided that based on its interpretation of Kansas Supreme Court precedent, Section 18, like Section 5, "only applies to causes of action existing at common law when the Kansas Constitution was adopted." *Tillman*, 424 P.3d at 548. Thus, like Section 5, Section 18 offers no protection to any tort developed after ratification.

40. KAN. CONST. Bill of Rts. § 18 ("All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.").

41. *Tillman*, 424 P.3d at 548.

42. *Id.* at 548–49.

43. *Tillman*, 485 P.3d at 660; *see also Kansas Supreme Court Case Suggests Court Would Uphold Damage Cap in Wrongful Death Cases*, KAN. ASS'N OF INS. AGENTS, <https://www.kaia.com/2021/06/21/kansas-supreme-court-case-suggests-court-would-uphold-damage-cap-in-wrongful-death-cases/> [<https://perma.cc/HBC4-J6DS>] (last visited Oct. 5, 2022).

B. Chief Justice Luckert's and Justice Rosen's Dissents

Chief Justice Luckert and Justice Rosen would have reversed the decisions of the lower courts and allowed the plaintiffs' suit to go forward.⁴⁴ Chief Justice Luckert argued that the tort of "wrongful birth," as defined by the Kansas Supreme Court in *Arche*, was not a new tort but the old tort of medical malpractice.⁴⁵ According to Chief Justice Luckert, when the *Arche* court described the tort of wrongful birth, it merely described medical malpractice according to (1) the factual circumstances presented by a claim that medical negligence led to a birth that the patient would otherwise have prevented, and (2) the requirements of Kansas abortion law at the time the case was decided.⁴⁶

Justice Rosen joined Chief Justice Luckert's dissent and also wrote his own in which he disagreed with the historical test the Court applied to Section 18.⁴⁷ Justice Rosen argued that past courts held only that Section 18 did not guarantee remedies for torts *barred* at common law—not that Section 18 did not guarantee remedies for torts that were merely *unrecognized* at common law.⁴⁸ Justice Rosen cited an Oregon Supreme Court decision, which held that its similar remedy clause was not limited to the definition of injury at the time the state constitution was adopted.⁴⁹ He suggested that he would apply this Oregon standard to Kansas.⁵⁰

C. Justice Stegall's Opinion

In *Hilburn*, Justice Stegall had concurred in part, lending his voice to a slim 4-3 majority. He argued that Section 5 was only "a procedural right to *who* decides It does not guarantee or prescribe the substantive matter of *which* questions Kansas courts can decide."⁵¹ In other words, Justice Stegall argued that if a measure was procedural, Section 5 would apply, and if the measure was substantive, Section 18 would apply.⁵² Under Justice Stegall's test, the Legislature could alter which questions the court could decide if it provided the injured party with a *quid pro quo*.⁵³ However, once those questions would be heard, the Legislature could not interfere with the

44. *Tillman*, 485 P.3d at 675 (Luckert, C.J. and Rosen, J., dissenting).

45. *Id.* at 672 (Luckert, C.J., dissenting).

46. *Id.* at 672–73 (Luckert, C.J., dissenting). Because Chief Justice Luckert held that K.S.A. § 60-1906(a) was unconstitutional under Section 5, she did not reach an analysis under Section 18. *Id.* at 675.

47. *Id.* (Rosen, J., dissenting).

48. *Id.* at 675–76 (Rosen, J., dissenting).

49. *Id.* at 676–77 (Rosen, J., dissenting). "[T]he framers . . . would have understood that the common law was not tied to a particular point in time but instead continued to evolve to meet changing needs." *Id.* (quoting *Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1007 (Or. 2016)).

50. *Id.* at 677.

51. *Hilburn*, 442 P.3d at 525 (Stegall, J., concurring in part and concurring in judgment).

52. *Id.*

53. *Id.*

injured party's right to have its case judged by a jury.⁵⁴ Justice Stegall ultimately joined the majority in *Hilburn* because he concluded that the cap on damages "did not alter the cause of action . . . but instead substituted [the Legislature's] judgment for the jury's."⁵⁵

In *Tillman*, Justice Stegall concurred with the majority but felt the Court should have gone further and expressly overturned *Arche*.⁵⁶ He explained that the *Arche* court recognized that a parent is injured by losing the opportunity to abort "children with 'gross deformities' who will 'never be able to function as a normal human being.'"⁵⁷ This recognition, which Justice Stegall called "a reprehensible discrimination," discriminated between healthy children and severely disabled children because only the lost opportunity of aborting disabled children would lead to a cognizable injury.⁵⁸ Interestingly, Justice Stegall agreed with Justice Rosen that the date the Kansas Constitution was adopted should not have "fossilized [the common law] in constitutional sediment."⁵⁹ Justice Rosen, however, wished to unfreeze the Constitution so that the protections of the Bill of Rights would develop alongside changes in case law.⁶⁰ Justice Stegall instead wanted to divorce the Bill of Rights from the common law so that the Legislature could define or adjust causes of action as society developed.⁶¹

IV. COMMENTARY

The tort of wrongful birth is controversial, even apart from the abortion debate. Unlike the tort of wrongful pregnancy, a claim of wrongful birth carries uncomfortable shades of eugenics because it suggests that the lives of disabled people are less valuable than the lives of healthy people.⁶² On the other hand, raising a disabled child is costly for parents and caretakers.⁶³ As long as there is a right to abortion, a negligent misdiagnosis in the womb results in parents incurring costs they otherwise would not have incurred.⁶⁴

Tillman raises the question of whether the Kansas Constitution is meant to protect an injured party's right to a remedy and right to have their

54. *Id.*

55. *Id.* at 527. One factor in Justice Stegall's conclusion was that under the statute, the jury was not permitted to know about the damage cap. *Id.* at 526.

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

57. *Id.* at 669 (Stegall, J., concurring in part and dissenting in part).

58. *Id.*

59. *Id.* at 671.

60. *See id.* at 677 (Rosen, J., dissenting).

61. *Id.* at 671 (Stegall, J., concurring in part and dissenting in part).

62. *See generally* Jillian T. Stein, Comment, *Backdoor Eugenics: The Troubling Implications of Certain Damage Awards in Wrongful Birth and Wrongful Life Claims*, 40 SETON HALL L. REV. 1117 (2010).

63. *Id.* at 1125–28.

64. *See id.*

case determined by a jury, even if our understanding of what constitutes an injury changes over time. The justices in *Tillman* took three separate approaches to this question. First, the majority believed that the Constitution should only preserve those rights and remedies available when the Constitution was adopted.⁶⁵ Second, Justice Rosen suggested that Section 18 was meant to apply to the courts' evolving interpretation of the common law—beyond that which was available at the time of the Constitution's adoption.⁶⁶ Third, Justice Stegall believed that Section 18 was never intended to constrain the Legislature's definition of the common law at all.⁶⁷

In *Horton v. Oregon Health and Science University*, the Oregon decision Justice Rosen cited and suggested Kansas should emulate, the Oregon Supreme Court cited to Morton J. Horwitz's *The Transformation of American Law, 1780–1860* to explain that the drafters of state constitutions experienced the common law dramatically shifting and adapting from its English origins.⁶⁸ The Oregon Court argued that because the framers would not have been familiar with the idea of a static common law, they "would [not] have sought to tie the protections of [the remedy] clause to the common law as it existed at a single point in time."⁶⁹

This interpretation presents a problem because it suggests that the courts, when developing the common law to alter available causes of action, would always be protected by the Constitution against resistance by the Legislature. However, the Legislature also has the power to modify the common law through statute.⁷⁰ One solution is to say the Constitution simply preserves the power of the courts over the Legislature when it comes to defining available causes of action.

Such a bold solution may not be necessary, however, because Section 18 does not render the Legislature powerless. The Legislature may still alter or constrain causes of action so long as the Legislature provides an alternative remedy or "quid pro quo."⁷¹ Justice Stegall called the "quid pro quo" test one of several "twists and turns" the Court has adopted to deal with the fact that Section 18 appears to freeze the injured party's common law rights of action in time.⁷² In fact, the "quid pro quo" requirement shows that the Court has already recognized that causes of action established pre-

65. *Tillman*, 485 P.3d at 666–68.

66. *Id.* at 676–77 (Rosen, J., dissenting).

67. *Id.* at 671–72 (Stegall, J., concurring in part and dissenting in part).

68. *Horton*, 376 P.3d 998, 1007 (Or. 2016).

69. *Id.* at 1008.

70. *See Manzares v. Bell*, 522 P.2d 1291, 1312 (Kan. 1974).

71. *See Hilburn*, 442 P.3d 509, 517–18; *see also* Jeffrey P. DeGraffenreid, Note, *Testing the Constitutionality of Tort Reform with a Quid Pro Quo Analysis: Is Kansas' Judicial Approach an Adequate Substitute for a More Traditional Constitutional Requirement?*, 31 WASHBURN L.J. 314, 343 (1992).

72. *Tillman*, 485 P.3d at 671–72.

1859 will sometimes need to be adjusted by the Legislature, but those adjustments should still be monitored by the Court. This rationale could extend just as easily to causes of action that were developed or created by the common law after 1859. Rather than debating whether a cause of action is new or when it arose, the courts could instead simply test whether the statute at issue reserves the injured party's right to a remedy under the party's common law claim. The "quid pro quo" test can be applied deferentially, which means the Legislature still retains considerable power to define available causes of action—just not absolute power.⁷³

From the Legislature's perspective, the Kansas Supreme Court created the tort of wrongful birth in *Arche*. However, this "creation" was a natural evolution of the common law. Even if wrongful birth was a new claim, created post-ratification, the Legislature should have been able to modify the available remedy for this claim but should not have been able to simply abolish it.

V. CONCLUSION

Tillman v. Goodpasture illustrates that as technology and society changes, our common understanding of legal injuries changes as well. Although the Legislature should have the power to alter available claims, that power should not be determined by whether that claim is said to have been defined before or after the Kansas Constitution was ratified. These questions are too important to leave entirely to one branch of government.

73. See DeGraffenreid, *supra* note 71, at 343.