

Case Name:

Jones (Guardian ad litem of) v. Rostvig

Between

**Liam Thomas Jones, an infant by his mother and
Guardian ad litem, Kelly Rae Short, the said Kelly
Rae Short and Leonard James Jones, plaintiffs, and
Dr. Lars Jeffrey Rostvig, defendant**

[2003] B.C.J. No. 1840

2003 BCSC 1222

Vancouver Registry No. C980426

**British Columbia Supreme Court
Vancouver, British Columbia**

Humphries J.

Heard: May 26 - 30, and June 2 - 11, 2003.

Judgment: August 1, 2003.

(99 paras.)

Damages -- Torts affecting the person -- Wrongful pregnancy, birth or life -- General damage awards -- Cost of future care and treatment -- Pain and suffering, loss of amenities and other non-pecuniary damages.

Action by Jones against Rostvig, a doctor, for damages and the costs of caring for a child born with Down's Syndrome. The mother claimed that she would have terminated the pregnancy had Rostvig met the appropriate standard of care and provided proper advice as to the risks of Down's Syndrome and the advisability of amniocentesis testing. Rostvig admitted liability. The child, now six years old, was classified as having a moderate intellectual disability with an IQ of 50. He was expected to attain the cognitive capacity of a six to eight year old and had a life expectancy of 57 years. Due to a brain injury, the child's father was unable to care for him for more than a few hours at a time. The mother was a strong and capable woman who had provided suitable care for her child. The parents sought damages for the pain, anguish and suffering associated with the child's birth and development. They also sought damages for the costs of raising the child. They took the position that the child would be under his parents' care for his entire life. Experts at the trial were overwhelmingly of

the opinion that the child would benefit from moving into an assisted living apartment or group home setting at the age of 25. The mother pursued an in trust claim for care up to the time of trial, the cost of future care during his school years, and afterwards. She also sought damages for various types of future therapy, and for past and future wage loss.

HELD: Action allowed. The mother was awarded \$70,000 in nonpecuniary damages and the father was awarded \$45,000. They were entitled to be compensated for a reasonable level of care while the child lived with them. His interests would be best served by moving to a group home setting at the age of 25, and after that point, his parents would no longer be responsible for the costs of his care. The child's care between birth and age three required no more time than for any infant. Between age three and six, approximately three extra hours per day were required. The respite care workers relied on by the family were able to provide appropriate care at \$10 per hour. Based on that amount, the parents were entitled to \$33,000 for that period. During the school years until age 19, the parents were entitled to four hours per day, and eight hours per day from age 19 to 25 at a rate of \$17 per hour. Damages were awarded for speech and language therapy until age 13, occupational therapy to age 21, physiotherapy until age 13, and a nutritional consultant to age 13. The parents were entitled to psychological counselling, respite care and a yearly membership in the Down Syndrome Research Foundation. They were reimbursed for the portion of the cost of speech therapy paid for by the father's insurance and their deductible. The mother was awarded \$46,000 in past wage losses, but none for future wage loss. The child's daily care was paid for until age 25, and the mother was free to supplement this care by being available full-time for the child or returning to work, if she so chose.

Counsel:

Robert D. **Gibbens**, for the plaintiffs.

J.M. Lepp and Raj Samtani, for the defendant.

[Quicklaw note: A Corrigendum was released by the Court August 13, 2003. The correction has been made to the text and the Corrigendum is appended to this document.]

1 HUMPHRIES J.:-- Liam Jones was born on April 11, 1997. He has Down's Syndrome. (I note that the cases and the reports refer to this condition as Down Syndrome or Down's Syndrome. I will use Down's Syndrome, as that is the term used in the Concise Oxford Dictionary). Liam is now 6 years old. His total life expectancy is agreed to be 57.25 years.

2 His parents, Kelly Short and Leonard Jones, advance a claim for non-pecuniary damages and for the cost of Liam's care from birth and for the rest of his life on the basis that the defendant failed to advise the mother of the risks of Down's Syndrome and the advisability of amniocentesis testing which would have revealed it. His mother also advances a claim for past and future wage loss. (Throughout the trial Ms. Short was referred to as "Mrs. Jones", so I will refer to her that way).

3 On the pleadings, liability is in issue and no Notice to Admit has been filed. During cross-examination of Mrs. Jones, it appeared that counsel did not agree on the scope of the issues before me. At my insistence, counsel for the plaintiffs, with the consent of counsel for the defendant, filed a letter which forms the basis upon which the trial proceeded. According to that letter, the defendant

admits the pregnancy would have been terminated had he met the appropriate standard of care and provided proper advice to Mrs. Jones. Therefore the only issue before me is the assessment of damages.

4 It is important to note that this is a claim brought by Liam's parents on their own behalf for the costs associated with raising Liam. It is not Liam's claim. Liam's claim for damages was dismissed in an earlier proceeding, as such a cause of action is not recognized in Canada. Notwithstanding that this is the parents' claim, the prime consideration in the assessment of the level of care is what is in Liam's best interests.

5 Liam is described as a happy, healthy, active, social little boy, although he has no friends at kindergarten and is not invited to children's gatherings. He goes to swimming lessons and is enrolled in a horse-riding program for the disabled which he enjoys. He cannot be left alone, has no safety consciousness and must be constantly supervised. His attention span, unless he is watching a favourite TV program, is 2 - 4 minutes. He is not toilet trained yet, but is expected to become so, perhaps later this year. He can put together two-word sentences, can feed himself in some fashion, although with great effort and mess, and can take part in a limited way in dressing himself.

6 There is no dispute about the level of function Liam will eventually reach. According to Dr. Joschko, the psychologist called by the defendant, Liam is classified as having a moderate intellectual disability. He has an IQ of approximately 50. He is expected to gain and develop skills in all functional areas by the age of approximately 14; that is he should be able to carry on simple conversations, even with strangers, and have some basic reading and self-care skills, with supervision required. He will never be competitively employable, but might do unskilled, repetitive work with direct supervision or assistance. He will never live independently and will need lifelong supervision and monitoring.

7 Liam is expected to attain the cognitive capacity of a 6 - 8 year old and will not advance beyond that. Otherwise, as he matures, he will have the motivations and desires of an adult.

8 The amount and type of care to be provided to Liam depends upon his age. Three time periods are in issue: pre-school; school (6 - late teens or early twenties); and adult.

9 The first period will end this September when Liam enters school full time. For the first and second periods, the most important issue is the number of hours and the hourly rate required for a daily caregiver. For the latter period, Liam's adult years, the most contentious issue is whether it would be in Liam's best interests to go into a group home or to live with his parents for the rest of his life.

10 I note the hesitation with which, throughout the evidence and the submissions, counsel and the experts avoided the use of the word "normal" in order to avoid suggesting that Liam is not normal. However, this case is about the costs associated with raising Liam because he is not a normal child as the word is commonly used. While there could be an interesting debate on what is "normal", for the purposes of this case, I will not avoid the use of the word.

LIAM'S FAMILY

11 Liam is the only child of Mr. and Mrs. Jones together; he has two half-brothers, aged 18 and 15. Both these boys have attention deficit disorders and Liam also exhibits those tendencies; one brother is hyperactive, and the other has a learning disability and is being home schooled. He is a

very talented golfer and hopes to attend university in the United States on a golf scholarship. From all the evidence before me, they have a close and loving relationship with Liam.

12 In 1999, Mr. Jones fell off a ladder at work and suffered brain damage. He no longer works, and finds his tolerance and patience are much less than they used to be. He loves Liam dearly but cannot be left to supervise him for more than three hours at a time.

13 Notwithstanding all of these difficulties, Mrs. Jones, who is a very strong and capable woman, manages to keep the family running, with the assistance of her and Mr. Jones' parents and other relatives. There is no dispute that Liam's immediate and extended family is loving, nurturing, stable and supportive. However, it is also clear that the whole situation is stressful and exhausting for both parents.

GENERAL DAMAGES

14 Mr. and Mrs. Jones each claim non-pecuniary damages for the pain, suffering and anguish associated with Liam's birth and development.

15 The defendant agrees Mrs. Jones is entitled to such an award. While not conceding that Mr. Jones is entitled to general damages, and in fact presenting the arguments against it, the defendant agrees that the current state of the law in this court supports an award for Mr. Jones as well.

16 In *R.H. v. Hunter* (1996), 32 C.C.L.T. (2d) 44 (Ont. H.C. (Gen. Div.)), where the claim involved the birth of two children with muscular dystrophy, the father, although separated from the mother, would still be involved to some extent in the care of the child. He received \$40,000. The mother received \$130,000. In *Krangle v. Brisco* (1999), 55 B.C.L.R. (3d) 23 (S.C.) aff'd [2002] 1 S.C.R. 205, the mother received \$65,000, the father \$40,000. In *Zhang v. Kan* (2003), 15 C.C.L.T. (3d) 1, 2003 BCSC 5, the mother was awarded \$20,000; the father \$10,000.

17 Mr. Jones seeks \$60,000. Mrs. Jones seeks \$75,000. The defendant submits the awards should be \$40,000 for Mrs. Jones, and \$20,000 for Mr. Jones.

18 Following Liam's birth, it took several days for the tests to confirm that he had Down's Syndrome. The parents waited, alternating between hope and dread. Both were devastated at the news that their expected child had Down's Syndrome. Mr. Jones' reaction was particularly intense. Mrs. Jones' reaction was one of guilt, as she felt she had contributed the genes that had cheated her husband of a normal son.

19 After the emotional experience of telling their extended families about Liam, Mrs. Jones began to collect information on Down's Syndrome. She met with a member of the child development program and began to understand what the future held.

20 Liam had some medical problems as an infant, but had good health as a toddler. He is now six and obesity, a common phenomenon for Down's Syndrome children, has become a problem, although Mrs. Jones has been successful in modifying his diet. He has had a couple of bouts of aspiration pneumonia but is generally healthy.

21 The comments of Low J. in respect of the child with Down's Syndrome in *Krangle* at paras. 118 and 119 are apt:

The birth of Mervyn and the discovery of his condition put considerable stress upon both his parents and brought them a great deal of emotional pain. Raising

him, the greater burden of which rests with Mrs. Krangle, is much more difficult than raising Calvin.

...Although he requires special care and attention, he is not significantly disabled physically and his mental handicap is substantial, not severe. He is loving, personable and sociable. I have no doubt that he provides much joy to his parents. He will develop mentally and emotionally. He does not have a debilitating disease and he will achieve a measure of independence from his parents.

22 The considerations underlying the awards of damages (\$65,000 and \$40,000) in that case cannot be distinguished from this. Allowing for the lapse of time since that judgment, I set non-pecuniary damages at \$70,000 for Mrs. Jones and \$45,000 for Mr. Jones.

COST OF FUTURE CARE

23 The plaintiffs seek damages for the costs associated with raising Liam. In *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) McLachlin J., as she then was, discussed the standard of care which must govern an award of damages for the cost of future care. At p. 78 she said that an award for future care is "based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff." As noted by Catliff J. in *Zhang*, that standard requires reasonable future care, not optimal care. As I have already stated, the primary consideration in the assessment of the level of care is what is in Liam's best interests.

24 As a child, Liam will be under the care of his parents. That is in his best interests. The parents are therefore entitled to be compensated for a reasonable level of care while Liam lives with them. The important issue is whether it is in Liam's best interests to live with his parents for the rest of his life.

LIAM'S CARE PAST THE AGE OF 19

25 The plaintiffs are adamant that Liam will always live with them, perhaps in a separate suite, but always at home. They testified that they made that promise to themselves immediately after Liam's birth. They are suspicious of group homes and feel strongly that only they can provide the level of love and nurturing that will allow Liam to thrive and be happiest.

26 That attitude is not only understandable, it is inevitable, given Liam's young age and his parents' devotion to him. I am sure it is inconceivable to the parents that their little boy could be better off in any other environment, and indeed for the foreseeable future, he could not.

27 But what is in the best interests of Liam, the adult? All of the experts emphasize the need for social interaction and daily activities for a person with Down's Syndrome. It is important that disabled people not feel isolated, and are not taken care of by being put in front of a TV. Dr. Joschko, the psychologist called by the defendant said:

Liam will not be able to live independently, and he will always require supervision by others. Liam is at risk of becoming socially isolated and lonely; these are concerns raised by his parents during my interview with them. As an adult Liam will benefit from living in a setting where he is supported in following a routine and where he can be as independent and social as possible - this will maximize his independence, self-esteem, and psychological adjustment. He will likely

benefit from living in an assisted living apartment or a group home setting which would provide him with social contact and friendship, ongoing supervision and support, and help for his activities of daily living, at the same time as fostering his independence and self-esteem.

28 This general view was repeated, from the points of view of their respective expertise, by the defendant's experts, Dr. Farrell, paediatric neurologist; Dr. Kent, paediatrician; Dr. Herschler, specialist in physical medicine and rehabilitation; and Ms. Mageau, Clinical Nurse Specialist in community settings, experienced in children with Down's Syndrome. The plaintiffs did not call responsive experts in these areas, as their focus is on Liam's best interests being dependent on their strong wish to care for him in a home-based setting for the rest of his life.

29 Even Dr. Wishart, the developmental paediatrician called by the plaintiffs, suggested a group home as an option in his first report, but upon learning of the strong wishes of the parents, changed his opinion to support their position. He frankly admitted he sees himself as an advocate for parents and their point of view, whatever it may be.

30 Parental care of Liam throughout his life depends entirely on Mrs. Jones. Mrs. Jones claims for loss of wages to the end of her working life. From this it may be inferred that she expects to maintain an active full-time role in Liam's care for the remainder of his life. Although she purports to have a back-up plan in the form of her extended family, her two teenage sons and Mr. Jones' sister, none of these people were called as witnesses. The grandparents could never be expected to assume this full-time, stressful and exhausting responsibility. The brothers are only teenagers now and have their own lives to lead. In fact, to expect any of the relatives to assume the role of full-time guardian for Liam is unrealistic and unfair both to them and to Liam. The reality is if something happens to Mrs. Jones, Liam will likely have to go into a group home. It is much more preferable that the move be planned for.

31 The plaintiffs cite the comments of the Supreme Court of Canada in *Andrews v. Grand & Toy Albert Ltd*, [1978] 2 S.C.R. 229 at p. 245:

It seems to me difficult to conceive of any reasonably-minded person of ample means who would not be ready to incur the expense of home care, rather than institutional care...

If the test was intended to suggest that reasonably-minded people would refuse to bear the expense of home care, there is simply no evidence to support that conclusion.

32 For a person in the position of *Andrews*, that statement is obvious. However, within the same passage the court notes that they are dealing in that case with a person who is mobile and in full control of his mental facilities; *Dickson J.* is clear that the result might well be different for a person who is severely mentally impaired. As well, I do not take "home care" to mean that an adult should always live in his parents' home. An adult should live in his own home if possible.

33 Liam will become an adult. He will have adult motivations and desires. He should have the opportunity to live on his own, although of course not alone and not unsupervised. He is already a social little boy and will be able to function socially as an adult if closely supervised. He cannot obtain higher education or pursue a career, so social and physical activities will have to be the focus of

his life. He should be in an environment where he can have privacy, within the bounds of the necessity to be closely supervised and monitored, but can always have friends and social contacts. While his parents suggest this can be done through daily outings, in my view, this is best accomplished in a group home setting as the evidence of the experts suggests.

34 The evidence called by the defendant with respect to group home living shows that the family can be as extensively involved in Liam's life as they want to be. He will therefore have the constant loving attention of his family as well as the advantage of his own set of friends.

35 Brenda Gillett, director of the Chilliwack Society for Community Living, described the group homes available through her organization. These homes house two to four people each, with one staff member for every two people. She described the level of care, activities and family involvement, which is unrestricted and encouraged. It is not disputed that Liam would qualify for admission to such a home. The arrangements available in those group homes seem ideal for a person in Liam's situation.

36 Ms. Gillett could give no information about waiting lists, as the lists are kept by the Ministry of Health. Many witnesses said plans to move to a group home must be made well in advance and parents should begin to consider the options in the early adolescent years of their child. Ms. Gillett said what is only common sense: the older a person is, the more difficult it is to adapt to a change in environment; the average age for a person to move into one of their group homes is 25.

37 One can only respect the feelings and emotions of Mr. and Mrs. Jones that led them to promise Liam, upon his birth, that they would always care for him. However, in Liam's best interests, it is clear from the evidence before me that living in a group home would provide him with social interaction, daily activities, opportunities to socialize with other people who face his particular problems, chances to watch and imitate other people his age and learn from that opportunity. Most importantly, however, it allows the family to be as involved as they wish with his daily life, while still allowing Liam to have the possibility of his own set of friends and a feeling that he can function to some limited extent as an adult on his own.

38 I do recognize, however, that the Jones' desires are a factor to be taken into account in deciding what is best for Liam, and that they will require time to prepare Liam for the next stages of his life. Whereas in Krangle, the parents always intended to prepare their child for the move to a group home at age 19, the Joneses have never considered that approach. Taking into account the wishes of the family and the importance they place on family involvement, based also on Ms. Gillett's evidence and the reasonable assumption that Liam will require some extra time beyond the normal age of 19 to be considered an adult, I conclude that it would be in his best interests to move into a group home at age 25.

39 The defendant is not required to bear the costs associated with Liam's care beyond that point, as his care costs will be assumed entirely by the province of British Columbia, subject to an award for the contingency that government programs may be reduced or discontinued. I will deal with that contingency later in these reasons.

40 I am about to embark upon the exercise of calculating or assessing future care costs, based upon the respective submissions of counsel. In *Boren v. Vancouver Resource Society for the Physically Disabled*, [2003] B.C.J. No. 1547, 2003 BCCA 388, decided since argument concluded in this case, the Court of Appeal emphasized that the trial judge's task is one of assessment, not calculation.

Referring to the trial judge's comment, "The plaintiff's care has been funded by public funds and will continue to be so" the court said at paras. 23-25:

...the public funding dictates that there will be no loss at all for the cost of future care to the extent that the public funding is complete and covers the plaintiff's reasonable needs.

What we are considering is not properly regarded as a contingency at all, not even a positive one. The focus of the cost of future care inquiry should be, first, what is the risk that the public funds will not be provided to the extent required for the increasing care necessary for Mr. Boren; and, second, should an amount be awarded to provide for a higher standard of care than the care that would be covered by public funds. These are difficult questions, but the answers, in my opinion, to what are essentially questions of assessment are made more difficult and not easier by resort to mathematical calculations designed to provide the answer to entirely different questions such as: how many more hours of care a day is Mr. Boren likely to require.

In short, we have to look into the future and ask whether the amount of extra care reasonably required by Mr. Boren over and above the amount of care that he would have required but for this injury can be expected to be provided out of public funds, and what is the monetary value to be attached to the risk that it will not be. That is an assessment question. I do not think it was the question addressed by the trial judge though it should have been.

41 While such an approach is attractive in its simplicity, I have dealt with the issues on the basis of the submissions presented to me. The difficulty of the mathematical approach is amply demonstrated by the disparity amongst the various types of experts as to the hours of therapy necessary for Liam's best interests. I have, in some cases, simply chosen what appears to me to be a fair and reasonable result. Nevertheless, without the evidence called by the parties as to levels of care, I would have no framework in which to assess a global figure, and so would find the Boren approach difficult to implement.

PRE-SCHOOL TO AGE 6 (IN TRUST CLAIM)

42 Liam will enter school this fall. He has been in kindergarten this year. Other than that, he has been in the care of his parents. Prior to age 3, all children require full-time care so there is no difference for Liam. According to the experts, the extra time required for the care of Liam, once he reached the age of three, as opposed to the time for care for a normal child aged 3 - 6 is about three hours a day. The plaintiffs advance an "in trust" claim for Mrs. Jones for the care she has already provided to Liam.

43 It appeared that the plaintiffs were initially advancing a claim for a highly trained rehabilitation specialist to be available for Liam's care. This position was abandoned by the end of trial and their counsel submitted that the appropriate level of care was that of a community care worker (\$16.83 per hour, plus 30% in benefits for a total of \$21.88 per hour). Based on three hours a day for 365 days a year, this would be \$23,958.60 per year, or \$71,875.80 over three years. The defen-

dant submits that the level of care provided by a nanny service (\$10.00 per hour) is adequate, as this is what Liam's present respite care givers are being paid. They suggest an award of \$30,000.

44 If there was any evidence that the care Liam has received to date was inadequate or in any way not in Liam's best interests, the argument that his parents should have an in trust claim based on a more expensive level of care for that period would have more weight. However, he is happily bonded to his present respite care workers and enjoys his time with them. The in trust claim will be allowed at the rate of \$10 per hour for 1095 hours per year for three years, for a total of \$32,850.

SCHOOL YEARS

45 The plaintiffs' claim for cost of care for Liam, ages 6-12, and in school, is based on 3 hours of care on school days and 5 hours of care on other days, at the rate of \$21.88 per hour, or \$32,316.76 per year.

46 During the period in which Liam is aged 12-19, and based on the evidence that a normal child of 12 years old can be left alone and requires no supervisory care of the kind necessary for Liam, the plaintiff' claim is for eight hours on the days Liam will be in school, and for 16 hours on the days he will be out of school (based on the straight waking time, leaving 8 hours a day for sleep), for a total of \$97,322.24 per year until he leaves school. Thereafter the claim would be for 16 hours a day, or \$127,779.20 per year.

47 The defendant submits that he should not have to pay for attendant care costs based on straight waking time. There will be many hours in the day when Liam will be watching TV or be involved in family activities. The plaintiffs' whole case is based on the premise that Liam's family will always be closely involved with his life.

48 Counsel for the defendant refer to Zhang, where the plaintiff parents sought compensation for 10 hours of care per day but were awarded 4 hours per day for 365 days a year from age 13 - age 45, whether or not the child would be living in a group home as an adult. The court in Krangle also found 4 hours a day to be adequate up to the age of 19. At that point, the child would be in a group home and his care costs assumed entirely by the province of British Columbia.

49 The evidence referred to in those cases is similar to the evidence I heard in this case, and the consequent reasoning and results are applicable. As the court pointed out in Krangle, any child, even one over 12, is under the care and supervision of his parents or in school a lot of the time. There is no need for assistance for every waking hour. In-home assistance of four hours per day is appropriate until Liam reaches the age of 19. The parents will be receiving respite care of four days a month, or 48 days a year, plus 10 days of vacation (see discussion below) leaving 307 days a year which require a care allowance.

50 After the age of 19, when a normal child would function on his own, the hours of care must be adjusted to allow the parents to be put in the position they would have been in but for the defendant's negligence. I do not accept the need for care every waking hour, even for this period. Although the parents are not obligated to care for Liam, it is inevitable, given the strong family ties in this case, that Liam would be spending some time with them or on group activities each day.

51 I set 8 hours a day, for 307 days a year for Liam's care between the ages of 19 and 25.

52 At present the Joneses have the advantage of their respite care worker at \$10 per hour. However, Mrs. Jones has assumed nearly all of the care giving responsibilities. She is not required by law to do so. Liam cannot be rehabilitated or trained beyond a certain level; supervision, not skilled

assistance, is required. The Joneses are entitled to hire a care giver who will supervise Liam with patience, tolerance and kindness. Consistency in the care giver is desirable.

53 It cannot be assumed that this particular care-giver will always be available; she now provides respite care only.

In order to ensure that the Joneses will be able to hire appropriate care, a cost beyond the minimal \$10 per hour is warranted.

54 The care givers in the group homes run by the Chilliwack Society for Community Living earn almost \$17 per hour plus benefits of 30%. The plaintiffs therefore suggest that an appropriate hourly rate for a care giver is \$21.88 per hour.

55 The assistance to be provided to the Joneses for Liam's care while he lives at home is akin to but not the equivalent of the responsibilities that devolve on group home care workers, who have more people under their supervision and who provide a number of group-based services. I conclude that the basic rate of \$17 per hour, without the allowance for benefits, is a reasonable and appropriate rate to allow for Liam's care giver up to the age of 25.

THERAPIES

56 A basic and immutable fact is that Liam will never function as a normal child, regardless of how much therapy he is given. Rehabilitative therapies, therefore, are not required beyond a certain point. The experts agree that Liam will reach a plateau, and even at present, is best taught in "teachable moments" rather than in regular therapy sessions. Therefore the most efficient way to use therapeutic skills is on a consultative basis where Liam's family and care givers are taught how to maximize learning possibilities as they occur during the day.

57 The following therapies were addressed in the evidence of various experts. For the most part, rates were not in dispute.

Speech and language therapy

58 Based on Ms. Landy's evidence, the plaintiffs seek 2 one hour sessions per week from age 6 - 12, then one hour for 42 weeks per year from ages 13-21.

59 Dr. Kent recommends 2 -4 hours per month in elementary school in her report of March 2003. Dr. Kent is a paediatrician produced by the defendant; she has extensive experience working with children with developmental disorders, with a special interest in Down's Syndrome.

60 Ms. Landy is not an expert in any of the therapies she has provided a costing analysis for. I accept the opinion of Dr. Kent that Liam will benefit from certain rehabilitative therapies only until he plateaus, which will be in about 7 years. Thereafter, all of the rehabilitative therapies are not necessarily useful. Liam should have speech language therapy of 4 hours per month until the age of thirteen, at the rate of \$75.00 hour.

Occupational Therapy

61 Ms Landy suggests 12 hours of occupational therapy per year until Liam is 21 and 24 hours per year thereafter as part of Liam's rehabilitation requirement. Dr. Kent agreed with the recommendation of 12 hours per year until Liam is 21, but consistently maintained that rehabilitation is not a realistic goal for Liam, as he will not improve past a certain point. I accept that evidence. Liam will have 12 hours of occupational therapy per year to the age of 21.

Physiotherapy

62 The plaintiffs seek 10 hours per year until Liam is 21, based on Ms. Landy's recommendation. Dr. Kent suggests 4 hours per year on a consultative basis, already available at no cost through the school district. Dr. Hershler, who also recommends 4 hours of physiotherapy per year, notes that Liam is energetic, swims and rides horses, always with assistance. He cannot yet ride a bicycle. In order to focus Liam's energy and assist the plaintiffs in maximizing Liam's physical activities, some individual attention from a physiotherapist would probably be helpful to them while Liam is growing up. In addition to consultative assistance already available, Liam will have 2 hours of physiotherapy per year until the age of 13, at the rate of \$85.00 per hour.

Nutritional Consultant

63 Ms. Landy proposes the services of a nutritional consultant for 4 hours per year, as Liam, like many Down's Syndrome children, has a tendency towards obesity. The defendants, based on the evidence of their costing expert, Ms. Mageau, say such services are available free of charge, and Mrs. Jones has managed to change Liam's diet herself. Nevertheless, Liam is only six. As he grows up, his eating habits will change and Mrs. Jones should have some assistance in understanding the best diet for Liam. In my view, one hour per year, to the age of 13, is adequate and reasonable, at the rate of \$85.00 per hour.

Psychological counselling

64 Dr. Joschko, the defendant's psychologist, says some intervention would improve Liam's behaviour and be helpful in allowing the plaintiffs to feel more confident in managing it. He recommends 1-2 hours per month for the next year. Raising Liam is obviously stressful and presents difficult problems for the plaintiffs. Some counselling to assist them is in Liam's best interests. I order 15 hours total of psychological counselling at the rate of \$150.00 per hour.

Respite Care

65 The plaintiffs adopt the recommendation of Ms. Mageau as to respite care, while nonetheless contending her evidence should be disregarded in its entirety because her report was prepared over a long weekend. Ms. Mageau has worked for many years in the area of community care for disabled children and was in charge of nursing support and assessments of developmentally delayed children, including many with Down's Syndrome, in four school districts in the Fraser Valley from 1998 to 2002. I would not disregard her report, simply because she was able to prepare it in a short time.

66 The family already receives 48 hours of respite care per month. Ms. Mageau supports an additional 48 hours per month plus 10 days annually. In view of the unremitting stress and supervision required for Liam, this is reasonable, at the rate of \$17 per hour.

Down Syndrome Research Foundation

67 Ms. Mageau also agrees that a yearly membership in the Down Syndrome Research Foundation of \$150 is reasonable. I agree that it is in Liam's best interests that his parents belong to this organization which provides them with information and support, so there will be an order for \$150 per year for this membership to Liam's age of 25.

Dental requirements

68 Ms. Landy recommends two extra visits a year. No other witness, including Dr. Kent, saw a need for any particular assistance in this regard. I make no order with respect to dental assistance.

SPECIAL DAMAGES

69 Speech language therapy costs \$75 per hour. The At Home Program has paid \$60 per hour. 80% of the remaining amount is paid by Mr. Jones' insurance. The plaintiffs have paid the 20% themselves. Both counsel agree this should be reimbursed.

70 As for the 80% paid by insurance for which Mr. Jones pays the premiums, both counsel also agree that this is recoverable by the plaintiffs under the principles enunciated in *Cunningham v. Wheeler* (1994), 113 D.L.R. (4th) 1.

GOVERNMENT PROGRAMS

71 The parties differed on their approach as to the various services provided to disabled people by the government. While Liam is a child, he is expected to live with his parents and various government services are available to them. For instance, medical supplies, rehabilitation consultation, a portion of the cost of speech language therapy, and some respite care, are all paid for by the At Home Program. There is no dispute that Liam's disability qualifies him for this assistance.

72 The plaintiffs argue that the benefits available to the parents through the At Home Program while Liam is a child (medical supplies, rehabilitation consultation, a portion of the cost of speech language therapy and respite care) will stop once an award has been made and cannot therefore be used to reduce the damages payable by the defendant.

73 In both *Krangle and Zhang*, the courts held that the defendants were entitled to the benefit of services provided through the social safety net, with an appropriate allowance for the contingency of such programs changing or ending.

74 I could find no reference in those decisions to the type of evidence provided by the plaintiff's care costs expert, Ms. Landy. In this case, she said if a third party settlement is received, the details should be forwarded to the administrators of the At Home Program. If there is a duplication (the term was undefined), the district office will be advised. Once the family has used up the funds from the settlement, they may again receive benefits through the At Home Program.

75 The practical effects of this evidence are not apparent. I do not know what would be considered to be a duplication from the Ministry's point of view, nor do I know what occurs once the district office is advised. If I make an award and specify that it is supplemental to the benefits available through the province, or if I decline to make an award because the province will supply the particular service, then it appears that there could be no duplication.

76 If there are services now available to the plaintiffs (and indeed they have been receiving them to date), then these are not costs they will bear and the defendant should not have to pay for them (see the comments in *Boren*, supra). However, counsel for the defendant conceded that it could be a problem for the parents if "duplication" is interpreted to mean funds are clawed back, even from an award that is made to top up certain benefits. I have therefore set out awards with respect to the various therapies on the basis that they are necessary to provide a level of reasonable care and are not duplications of any which may or may not be provided through the At Home Program.

77 When Liam turns 18, the benefits accrue to him personally. He will receive disability benefits and medical benefits. If he lives in a group home, his expenses are borne entirely by the state. Ac-

ording to Brenda Gillett, her clients either get their disability payment and pay room and board in that amount to the group home, or the amount comes directly to the home.

78 As the Supreme Court of Canada said in *Krangle v. Brisco*, [2002] 1 S.C.R. 205 at para. 40:

When a disabled person becomes an adult, the burden of his or her care shifts from the parents to society as a whole, and it is accepted as fair and just that the continued burden of care of disabled adults should be spread over society generally. At one time it may well have been the moral responsibility of parents to care for a disabled child for as long as they lived. But for some decades now, that moral responsibility has shifted to British Columbia society as a whole, as expressed by legislation enacted and preserved by successive governments. ...Great as social and medical progress may be, disability will inevitably strike some members of society, randomly and irrationally. It is not immoral for a society to say that when this happens, the burden will not be confined to the individual and his family, but will be shared by society as a whole.

79 The plaintiffs argue that if they receive an award in this case, it will disentitle Liam to benefits because the province will look to a damage award to be depleted first. Several witnesses testified as to their understanding respecting this policy. In particular, Ms. Mageau, who is an employee of the Ministry of Health, agreed that if there is a damage award to the parents for the support of a child over 19, the Ministry will not duplicate the funds.

80 The defendant argues, with merit, that even if the import of Ms. Mageau's statement were that the government would have the right to claw back Liam's benefits because of a damage award to his parents, she must be mistaken. Liam is entitled to the benefits by legislation. A bureaucratic policy could not deprive him of them. Of course, the defendant's primary position is that no award for care costs to the parents in respect of Liam as an adult should be made.

81 As I have decided that Liam's best interests are served by his living in a group home from age 25, his parents will be funded for the cost of care to that age.

82 Ms. Mageau was careful to say that the government would look to a third party damage award before providing funds only if there was a duplication. As I have noted, I do not know what would be considered to be a duplication. If there is a decision to claw back Liam's benefits from age 18-25, and issue is taken with that decision, it will have to be dealt with at that time when all relevant parties, including the government, are before the court.

CONTINGENCY

83 In *Krangle*, the court set an award of 5% of the cost of care for the child's lifetime as a contingency against the possibility that government services would no longer be available. The defendant does not dispute that such an award should be given in this case. Counsel can calculate the contingency of 5% based on 8 hours of care per day at the rate of \$17.00 per hour between the ages of 25 and 57.25 years.

WAGE LOSS - MRS. JONES

84 Mrs. Jones claims for past and future wage loss on the basis that but for the birth of Liam, she would soon have returned to work.

85 Mrs. Jones graduated from high school in 1980, worked in two clerical positions from 1981-1984, stayed home with her children from 1984-1988, and worked for a year at another clerical job when Craig was one. From 1992-1996 she ran a day care in her home. When they moved to Chilliwack in 1996, she began working at Pharmasave in August, where she continued until February of 1997. Liam was born in April 1997.

86 Mrs. Jones initially claimed \$77,657 for pre-trial wage loss and \$263,468 for future wage loss to age 65. The defendant contends that the plaintiff's figures for pre-trial wage loss are erroneous in that their expert assumed a work week of 32 hours a week. According to Mrs. Jones' evidence, her work weeks alternated between 32 and 24 hours. The plaintiffs appear to recognize this deficiency in their final argument, reducing their claim to \$67,950.

87 As well, the plaintiff's expert included no negative labour market contingencies, which the defendant sets at 40%. They would set Mrs. Jones' past wage loss at \$36,000. The defendant suggests it is also significant that Wayne has been home schooled for the past year, which has nothing to do with Liam and which would require Mrs. Jones to be home in any event. Both Mr. and Mrs. Jones are involved in the home schooling, and they try to keep school hours.

88 Whether standard contingencies are chosen, or one looks at Mrs. Jones' actual circumstances, there is not a long-standing pattern of work, nor is there a clear indication that she would have continued regularly in the work market. Counsel for the plaintiffs point out, however, that Mrs. Jones has stayed in Chilliwack where her previous job was available to her if she had been able to return to it. I heard no evidence to suggest a promotion or higher paying job was possible.

89 It is impossible to say what would have happened if Mrs. Jones had returned to work for the past six years, but it is unrealistic to ignore contingencies. Given all of the above, I conclude it is appropriate to take negative contingencies into account when assessing Mrs. Jones' wage loss, but would reduce the figure to 20%.

90 The experts still differ on whether a contingency for part time work should be included, the plaintiffs' expert saying she was already working part time so this would be a double discount. This is a reasonable position.

91 Using a contingency figure of 20%, and based on a figure of \$67,950, Mrs. Jones' pre-trial wage loss is therefore \$54,360. The defendant's position that Mrs. Jones would have been home in any event for the past year due to Wayne's home-schooling was unanswered. One year out of six will reduce the award by roughly \$8500, thus making her pre-trial wage loss \$45,860.

FUTURE WAGE LOSS

92 The plaintiff claims \$237,675 for future wage loss, to Mrs. Jones' age of 65, based on \$13,832 per year. The defendant calculates it as between \$84,075 (to Liam's age 19) and \$104,561 (to Liam's age 25). However, the defendant suggests that if adequate care is provided, especially as Liam will be in school full time next year, there is no reason Mrs. Jones cannot return to work on the 32/24 hour basis she had before, and will therefore suffer no future wage loss.

93 Liam is expected to go into a group home at age 25. That is another 19 years. Wayne's home schooling is expected to be complete in another 2 years.

94 Is Mrs. Jones' continued involvement in Liam's care a bar to her returning to work? I have granted 4 hours per day for the care giver. Liam will also be in school. After Liam turns 19, there will be eight hours of care per day. It is possible for Mrs. Jones to return to work part time if she

wishes to do so. From her evidence, it is unlikely she will wish to do so. Regardless of Wayne's needs, Mrs. Jones wishes to be available at all times for Liam if called upon by the school, and wants to attend Liam's classes, field trips and all his activities.

95 Should the defendant bear the cost of Mrs. Jones' choice not to return to work? Little or no argument was addressed to this point. The defendants say that with the provision of a care package to attend to Liam's needs, there is no reason why Mrs. Jones cannot return to work and so should not be entitled to claim for future wage loss. The plaintiffs simply say there is little merit to the argument that a care award should free Mrs. Jones up to return to work. They cite Hunter, supra, where an award was made for daily assistance care, together with full compensation for future wage loss for the remainder of the mother's working life. Apparently no argument was raised that this was, in a sense, double recovery.

96 The defendant must pay for daily care for Liam until he reaches the age of 25. If Mrs. Jones decides to supplement this care by not returning to work and by being available full time for Liam, she is free to do so. However, that is her decision and not one for which the defendant must assume responsibility. It is unfortunate that the heavy burden of making this decision falls on Mrs. Jones, but it is largely a function of Mr. Jones' situation and this is not the fault of the defendant.

97 There will therefore be no award for future wage loss.

98 Summary of findings

General Damages/Wage Loss/Special Damages:

Non-pecuniary Damages for Mrs. Jones	\$70,000
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Non-pecuniary Damages for Mr. Jones	\$45,000
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Past wage loss for Mrs. Jones	\$45,860
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Special Damages See paras. 71 & 72

Table 1. Liam's Care Giver

[Quicklaw note: Table 1 could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@quicklaw.com and request the following document: 03bc1840.doc.]

Table 2. Therapies and Other Services:

[Quicklaw note: Table 2 could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@quicklaw.com and request the following document: 03bc1840.doc.]

99 I have not calculated the final figures, nor the present values, which result from my findings. I will leave that to counsel, along with tax gross up, management fees and costs, to be spoken to if the parties cannot agree.

HUMPHRIES J.

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CORRIGENDUM

Released: August 13, 2003

[1] My reasons for judgment dated August 1, 2003 are hereby amended as follows.

[2] On page 36, paragraph 96, the words "Is it" in the sixth line should be deleted and replaced by the words "It is". This paragraph now reads as follows:

The defendant must pay for daily care for Liam until he reaches the age of 25. If Mrs. Jones decides to supplement this care by not returning to work and by being available full time for Liam, she is free to do so. However, that is her decision and not one for which the defendant must assume responsibility. It is unfortunate that the heavy burden of making this decision falls on Mrs. Jones, but it is largely a function of Mr. Jones' situation and this is not the fault of the defendant.

HUMPHRIES J.

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