

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** MacLellan v. Fitzgerald, 2008 NSSC 318

**Date:** 20081030

**Docket:** SN No. 273579

**Registry:** Sydney

**Between:**

Megan MacLellan and Kyle MacLellan by their Litigation Guardian, Darrell  
MacLellan

Plaintiffs

v.

John David Fitzgerald and Sylvia Fitzgerald

Defendants

**Judge:** The Honourable Justice Frank Edwards

**Heard:** October 21, 2008, in Sydney, Nova Scotia

**Written Decision:** October 30, 2008

**Counsel:** Carolyn A. MacAulay, for the plaintiffs  
John David Fitzgerald and Sylvia Fitzgerald, in person

**By the Court:**

[1] This is an assessment of damages for injuries sustained by two children after each was bitten by a dog owned by the Defendant John David Fitzgerald. Default judgement had been obtained against both Defendants on September 10, 2008.

[2] The Defendants appeared without Counsel on October 21, 2008. At that time, based upon their educational level (Mr. Fitzgerald has Grade IV), and their inability to retain Counsel (they are impecunious), I heard evidence on the issue of negligence.

[3] The Plaintiff, Kyle MacLellan (d.o.b. February 19, 1997) was bitten on April 5, 2005. At that time, he was on his own property. Mr. Fitzgerald testified that his dog had been chained that day but had gotten loose without Mr. Fitzgerald's knowledge. The dog was five years old and had never bitten anyone before. I was therefore satisfied that Mr. Fitzgerald could not have reasonably foreseen that the dog would bite anyone on that day. I therefore set aside the default judgement with respect to Kyle. I am also setting aside the default judgement against Mrs. Fitzgerald. It is clear that the dog was owned by Mr. Fitzgerald alone.

[4] Megan MacLellan (d.o.b. March 22, 2000) was bitten on March 28, 2006. Between April 5, 2005 and March 28, 2006, Mr. Fitzgerald testified that his dog had gotten off his chain on numerous occasions. Mr. Fitzgerald did not take any additional measures (such as building a cage) to ensure that the dog did not leave his property. Megan was on her grandfather's property when she was bitten. That property lies between Megan's parents' home and the Fitzgerald property. As I told Mr. Fitzgerald, that his dog would bite another child was not only foreseeable, it was inevitable. Mr. Fitzgerald agreed that he was at fault. The default judgement against Mr. Fitzgerald for the injury suffered by Megan therefore stands.

[5] ***Megan's Injuries:*** Megan was bitten on the face and left ear. The ear was punctured but has since completely healed. There were also a couple of punctures and some scratches on the left side of her face as well as a puncture on the right side of her chin just below her lip. The day she was bitten must have been a terrifying experience both for Megan and her parents. There was a fair amount of bleeding.

[6] Fortunately, Megan's wounds did not require stitching. The physician merely applied tape to the wounds. For the next few weeks, Megan experienced pain for which she took Tylenol. Bruising and other marks had largely disappeared after four weeks. Megan still experiences some sensitivity to her ear. The puncture marks on her left chin and right cheek are now barely perceptible.

[7] For a short time after the event, Megan was nervous around dogs. I do not believe there is any lasting psychological impact. Megan impresses as a bright, happy child.

[8] I am satisfied that an appropriate figure for general damages would be \$6,000.00 plus costs of \$1,000.00 and \$1,200.00 in disbursements (I have reduced the photocopying charge).

[9] *Summary:*

General damages (pain and suffering)	\$6,000.00
Costs	1,000.00
Disbursements	<u>1,200.00</u>
Total	\$8,200.00

[10] The default judgement regarding Kyle is set aside as is the default judgement against Sylvia Fitzgerald.

Order accordingly.

J.