

## INSURANCE ALERT

SEPTEMBER 2005

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## COSTS OF TRUST MANAGEMENT FOUND AGAINST NEGLIGENT TORTFEASOR

The High Court of Australia, by joint judgment of the Full Bench, **delivered on 7 September 2005**, has determined that a person under a legal disability as a **consequence of the tortfeasor's negligence** is entitled to recover by way of damages all of the fees and charges incurred by the Trustee in managing the damages fund.

In Willett -v- Futcher, the High Court had to determine what kind of costs of managing a damages award ought to be awarded to a person incapable of managing their own affairs in circumstances where their incapacity was caused by the defendant's negligence. The High Court determined that an amount ought to be assessed allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund. It held that no distinction ought to be made between the types of charges that would be incurred by the trustee. That is, there ought be no distinction in assessing what is recoverable between administration charges or management charges or brokerage fees. All expenditure properly charged or incurred that depletes the trust fund is recoverable in order to ensure that the damages award meets the plaintiff's need for their lifetime.

The Court considered the operation of the *Public Trustee Act* and the *Trustees Company Act* in relation to the fees and charges that a trustee can properly charge on the trust fund, in performance of its role of trustee.

The effect of the decision is that those charges will no longer deplete the damages award of the plaintiff, but will be payable by the tortfeasor.

The impact for insurers may be that greater sums will have to be paid towards this head of damage. The sum that is to be paid in each case, will depend upon expert opinion and the nature of the investment strategy which is required to be undertaken by the relevant trustee in order to ensure that the trust sum meets the need for which it was created.

It will be imperative for Insurers to make adequate allowance in their reserving practices to allow for the increased damages which are likely to flow from this decision.

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