

THE ‘TRANSACTION’ COST OF THE CURRENT TORT INJURY MODEL

The litigation-based tort model has been criticized as lengthy and expensive when compared to schemes that pay actual injury costs and restrict or prohibit claims for pain and suffering. The 2017 Ernst Young report on ICBC stated that “legal costs” represent 24% of the cost of ICBC’s Basic expenditures for policy year 2016.¹ Ernst Young did not provide the financial detail to support this estimate (which equates to approximately \$900 million for FY2016/17), but the percentage has been used by the media and other sources since the release of the report.²

What portion of ICBC’s expenditures for injury claims is actually received by the claimants, and how much is spent in determining liability and a fair financial settlement for the damages to the innocent party?

This analysis of ICBC’s FY2015 information suggests that of the \$2.0 billion spent, only \$1.16 billion, or 57%, is received by the injured party/claimant. The difference of \$840 million—the transaction cost--was spent on legal fees, litigation disbursements, medical reports and staff adjudication costs.

BACKGROUND

British Columbia is the last jurisdiction in Canada that allows auto insurance claims to be settled based on the full tort model where liability must be established, and claimants can sue the at-fault party to recover financial losses and for the disruption to their normal life style (also known as general damages or pain and suffering).

Many jurisdictions have switched to a hybrid tort, or a form of no-fault model to reduce the pain and suffering component of settlements, and to eliminate some of “transaction” costs which are inherent in the litigation-based model. In 2016, for example, the state of New South Wales changed from a restricted tort model to a hybrid no-fault model, and reduced premiums for urban drivers by 19%.³

The transaction cost is defined here as the difference between what ICBC pays to settle injury claims and the amount ultimately received by the injured party. These transaction

¹ <http://www.icbc.com/about-icbc/company-info/Documents/Affordable-and-Effective-AutoInsurance-Report.pdf> p. 9.

² <http://vancouversun.com/opinion/op-ed/editorial-fixing-icbc-is-now-ndps-burden> A 2016 consultation paper produced by the government of New South Wales stated at only 45% of premium revenue was received by claimants; see

http://www.bcpolicyperspectives.com/media/attachments/view/doc/occasional_paper_no_51_28_january_2018/pdf p. 2.

³ http://www.bcpolicyperspectives.com/media/attachments/view/doc/occasional_paper_no_51_28_january_2018/pdf

costs include the claimant's and ICBC's legal fees, disbursements, court ordered costs, medical reports and the cost of ICBC injury claim adjudication function.

METHODOLOGY

The methodology used to develop the estimated amount of injury claim payments received by the claimants in FY2015 is explained in Appendix A.

COST OF INJURY CLAIMS PAID/CLOSED FY2015.

In 2015, ICBC paid \$2.02 billion for initial no-fault accident benefits, or for the cost of negotiated or court awarded injury claims, including the legal fees (plaintiff and defense), disbursements and other related costs, and for ICBC's claims adjudication cost related to injury claims.

The amounts are separated by claimants who are unrepresented and for those that have obtained legal representation. The separation is my estimate.

TABLE 1 -- ESTIMATED PAID COST OF BASIC AND OPTIONAL INJURY CLAIMS FY 2015 (\$=million)

		Unrepre.	Repre.	Total	Legal Fees	Claimant
1	Acc. Benefit-Immed.	183	--	183	--	183
2	Acc. Benefit-Litigated	e40	e500	540	(160)	380
3	Pain & Suffering	e40	e814	854	(260)	594
	Total Paid Claims	e263	e1,314	1,577	(420)	1,157
4	ICBC Legal Fees			107	(107)	--
5	Litig. Cost Claimant			152		--
6	Litig. Cost ICBC			50		--
	Total Related			307		--
7	ICBC Adjudication			135		--
	Grand Total			2,021	(527)	1,157

Source: ICBC Annual Report 2016/17, and BCUC, ICBC 2017 Rate Request, IR 1, RM 4.2.

Notes: The Total column amounts are from ICBC's 2017 rate request information response to information request RM 4.2,⁴ while the split for lines 2 and 3 between unrepresented and represented claimants is my estimate. The legal fees costs on lines 2 and 3 are my estimates using a contingency factor of 32% (maximum allowed is

⁴ ICBC, ICBC 2017 Rate Request, IR 1, RM 4.2.

331/3%), while the ICBC legal fee was in the RM 4.2 response. Item 7 is my estimate of ICBC's claim service cost assuming 50% of the \$271 million spent in 2015. It is based on the claims division FTE split for injury and property claims for 2016.⁵ (Footnote)

What Table 2.1 shows:

- Of the \$2.0 billion associated with settled injury claims in FY2015, claimants received \$1.16 billion (57%), and \$864 million (43%) went to “transaction” costs, including legal fees, disbursements, medical studies and ICBC injury claim adjudication costs;
- Injured parties were paid \$183 million as initial no-fault accident benefits, while the not-at-fault had to claim a further \$540 million for these accident benefit costs, either because the 1991 limits were exceeded or ICBC did not agree to fund the costs prior to the initiation of litigation;
- Pain and suffering (general damages) payments totalled \$824 million, or 42% of the total injury cost;
- Claimant and ICBC legal fees total \$527 million, or 26% of total injury costs.

While 2017/18 injury claim settlement costs will be significantly higher than those for 2015, it is unlikely that the proportion of the total payment received by the claimants will be much different than that of 2015.

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⁵ I used the 2016 FTE numbers because ICBC was adding more injury claims FTEs in 2016; see BCUC, ICBC 2017 Rate Request, IR 1, RM 4.5.

APPENDIX A

METHODOLOGY

ICBC 2016/17 Annual Report Not Used

In 2016, the government ordered ICBC to switch from its historic January to December fiscal year to the government standard April to March reporting period. Unfortunately, ICBC reported its 2016/17 results on a 15-month transition year, making comparisons with the prior 12-month year impossible.

A key data source on injury claim payments, supplied during the BC Utilities Commission's 2017 rate requirement review, compared injury claim payments using the April to March 2016/17 fiscal year. These results could not be compared to the 15-month annual report data.

Because the purpose of this paper was to determine the proportion of injury payments received by the claimants, I decided to use the comparable FY2015 data.

Focus Solely on Injury Claims

Payments for claims for property damage (approximately \$1.27 billion in 2015) generally do not entail legal fees and other litigation disbursements. This study excludes these costs.

Include Basic and Optional Injury Costs

The Ernst Young report discussed only Basic costs. Because the government has established ICBC as a monopoly public insurer for the compulsory Basic third-party liability coverage, the government has a duty to keep premiums affordable. Since ICBC has some 90% of the Optional coverage market,⁶ this duty also extends to the cost of the Optional program.⁷

For this reason, it is preferable to review the injury cost payments of the combined Basic and Optional programs to estimate the transaction costs and the ultimate payment to the injured party. Where an injury settlement exceeds the \$200,000 Basic liability limit the difference is paid from the Optional program, and these larger claims tend to have legal representation and involve a significant amount of the total payments for pain and suffering.

⁶ See http://www.bcpolicyperspectives.com/media/attachments/view/doc/bcuc_icbc_2016_final_20_dec_2016/pdf p. 6.

⁷ ICBC negotiates/litigates injury claim settlements, and where final amount exceeds the Basic \$200,000 coverage limit the Optional insurance protection is accessed (if available).

Settled/Paid Claims

This estimate was developed from ICBC data on injury claims **settled** in 2015, rather than the **estimated** cost of current claims, and any adjustments to the prior year claims liability, provided in ICBC's 2015 annual report (which does not provide the detail for injury claims separate from property damage claims for the Basic and Optional programs). ICBC's total reported expenditures for 2015 is shown in the Appendix B.

No-Fault Accident Benefits Included

Injury claims generally include pecuniary (out-of-pocket) expenses as well a claim for non-pecuniary (pain and suffering) costs. Court costs and special damages are also included for those claims that were ultimately determined by the court.

The estimate includes the Accident Benefit (or Part 7 benefit) paid by ICBC without a formal claim (low transaction cost), and the amount recovered through a formal claim. Including both amounts provides a complete summary of these costs, which may include medical rehabilitation, wage loss, home care and death benefits.

APPENDIX B

ICBC EXPENDITURES FOR FISCAL 2015

Table 1 summarizes ICBC's combined Basic and Optional expenditures for FY2015, as found in various parts of its 2016/17 annual report.

TABLE 1 – Combined Expenditure FY 2015

	=\$million	Per Cent	Source
Claims Est. --Injury	2,748	51.6	AR'17 p. 23
--Property	1,294	24.3	AR'17 p. 23
Claims Est. Total	4,042	75.9	AR'17 p. 97
Claims Serv. & Adjud.	271	5.1	AR'17 p. 97
Safety& Enforcement	50	0.9	AR'17 p. 37
Sales -- Commissions	364	6.8	AR'17 p. 90
Sales – Prov. Taxes	236	4.4	AR'17 p. 90
ICBC Administration	244	4.6	AR'17 p. 97
Licensing & Registr.	123	2.3	AR'17 p. 97
TOTAL EXPEND.	5,330	100.0	

Source: ICBC Annual Report 2015.

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