

# Million Preventable Deaths and Liability of The Tobacco Industry in India

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## Abstract

*Tobacco is the only legally sold consumer product that kills half of its users in their lifetime. It continues to kill more than one million Indians every year. Even though larger pictorial health warnings, covering 85% of the principal display area of tobacco packs, now more expressly convey the dangers associated with tobacco use, tobacco induced disease, disabilities and deaths continue to impoverish millions of Indian families in absence of a clear liability of manufacturers of this inherently dangerous product. It is high time that tortious liability of the manufacturers of tobacco is fixed for the loss of life and livelihood due to tobacco use. The industry should also be liable for the non-implementation of the tobacco control and other legal provisions meant to regulate the industry. India may not be able to achieve its health goals as envisaged under the UN-SDGs 2030 without making the tobacco industry pay for health costs associated with tobacco use. If the dangers of tobacco products are to be eliminated from the country, the tobacco companies should be held liable for their misdemeanors and asked to compensate individuals and the Government for the outrageous social, economic, environmental and health costs incurred due to tobacco use.d.*

**Keywords:** *Consumer, Tobacco, Health, Environment*

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## I. Introduction

Tobacco is the single largest cause of preventable disease, disabilities and deaths globally. However, nearly 35% (47.9% male and 20.3% female) adults in India use tobacco in some form. About 14.6% (Boy = 19.0%, Girl = 8.3%) of youth (13-15 years) also use tobacco in some form<sup>1</sup>. Sixth grade students are two to four times more likely to consume tobacco as compared to eighth grade students. The gender gap is narrowing with more young girls starting to use tobacco. In India, more than one million deaths annually are attributed to smoking alone whereas, more than 2.54 million children and more than 120 million adults continue to use tobacco every day. Tobacco use contributes to approximately 60% of all CVD death in India, and 42% and 18% of cancer death among men and women respectively are due to tobacco use<sup>2</sup>.

Tobacco use is not simply a health burden. Huge economic losses are incurred due to massive expenditures on the treatment of diseases caused from tobacco use<sup>3</sup>. The total health cost due to death, diseases and disabilities caused by tobacco use was more than US\$ 22.4 billion (in 2011). It is estimated that direct expenditures on tobacco use and out of pocket expenditures on health care cost, which otherwise could be spent on food or education for children, impoverish about 15 million people in India. During the same period, tobacco use represented 12% of male and 1% of female deaths in the country while it is estimated that the tobacco industry continues to make a profit of US\$ 10,000 from each tobacco related death globally<sup>4</sup>.

Though several efforts were undertaken to curb tobacco use in the country, the first national legislation on tobacco control came in 1975 prescribing the first text only statutory warning "cigarette smoking is injurious to health" for all cigarette packages and advertisements in India<sup>5</sup>. It was only in 2003 that the Government enacted comprehensive tobacco control legislation and

ratified the first global public health treaty on tobacco control in 2004<sup>6</sup>. The Cigarettes and Other Tobacco Products Act (COTPA) was implemented with intent to meet the objectives of protecting and promoting public health as enshrined under the Constitution of India and thereby prevent the present and future generation from the ill effects of tobacco use. The law bars all direct and indirect tobacco advertisements, promotion and sponsorships (TAPS), mandates display of pictorial health warning on all tobacco products, prohibits sale of tobacco products to any person below the age of 18 years and around educational institutions and prohibits smoking in public places<sup>7</sup>. Though the law clearly prescribes that any person, including company, is liable for any violation of COTPA and regulations formulated thereunder<sup>8</sup>, in the last 12 years, no tobacco company has ever been held liable for any violation of COPTA.

In this paper, we attempt to review the immediate legal obligations of the manufacturers of tobacco in India under the domestic and international legal provisions while analysing some of the key judicial pronouncements with respect to fixing liability of the tobacco industry for violation of civil rights of individuals affected by tobacco use<sup>9</sup>. A review of legal principles and provisions has been undertaken to indicate the areas and situations under which tortious liability of tobacco companies' could be established. Examples and illustrations from various countries have been explored in support of the presented arguments<sup>10</sup>.

## **II. Tobacco Industry's Legal Obligations**

Following section provides an overview of the legal obligations of tobacco manufacturer with respect to its product, imposing a duty to ensure compliance with the law besides an inherent duty of care towards the public in general<sup>11</sup>.

## **III. Protection from Exposure to Tobacco Smoke**

No person shall smoke in any public place, including workplaces and open areas of general public gatherings like bus stands and parks. The law, in effect, envisions protection from all forms of exposure to second hand tobacco smoke (SHS) at all public places at all times<sup>12</sup>. The Supreme Court of India had observed that, exposing unsuspecting individuals to SHS, with ominous consequences, amounts to taking away their life, by a slow and gradual process and labelled it as violation of the right to life enshrined under Article 21 of the Constitution of India. Recent evidence on epigenetics suggests that active or passive exposure to tobacco smoke can have trans-generational effects on risk of disease, thereby threatening the rights of more than one generation<sup>13</sup>.

## **VI. Protection from Exposure to Tobacco Advertisements**

The law prescribes a complete ban on any form of direct or indirect tobacco advertisement, promotion and sponsorships. It also regulates point of sale (PoS) advertising by prescribing the size of the display board at the entrance of warehouse or shop where cigarettes or any other tobacco products are offered for sale<sup>14</sup>. Such a board should not exceed 60x45cm and should bear a health warning covering 20x15cm area saying "Tobacco Causes Cancer" or "Tobacco Kills". The display board should only list the type of tobacco products and no brand name, pack shot of tobacco product or other promotional messages are allowed to be displayed. However, the tobacco industry continues to flout these rules and manage TAPS through "brand stretching", "brand sharing", "brand placements" and "product placements"<sup>15</sup>. The industry continues to defy prohibition on brand and product placements in films and television programmes, in spite of the clear prohibition against any such display under India's film rules since October 2011. Research suggests that, exposure to tobacco advertisements and their receptivity to tobacco marketing

is significantly related to increased tobacco use among youth<sup>16</sup>. Adolescents in India who are exposed to tobacco use in Bollywood films are twice as likely to take up tobacco use<sup>17</sup>.

## V. Protection of Minors from Exposure to Tobacco Products

The law intends to prevent present and future generations from the adverse effects of tobacco use by forestalling minors' access to tobacco<sup>18</sup>. The law, not only completely bans the sale of tobacco products to and by minors, but also prohibits its sale within 100 yards of educational institutions. Further, the regulations do not allow any sale through vending machines and also prohibit visible display of tobacco products. It is obligatory for sellers to display a board measuring 60cmX30cm at the PoS which displays a pictorial health warning covering 40% and the rest of the board saying that "sale of tobacco products to a person below the age of 18 years is prohibited". However, the tobacco industry, through its well managed retail supply chain, violates the provisions by selling to minors, not insisting on age proofs, supplying tobacco to vendors within 100 yards of educational institutions and displaying tobacco advertisement and promotion materials at such PoS as well.

## VI. Mandatory Display of Pictorial Health Warnings

It is important to warn everyone about the dangers of tobacco and tobacco packs are the best means to communicate this warning. The law mandates that no person can produce, supply, distribute or import any tobacco product unless every tobacco product package carries a specified health warning including a picture as specified in the rules. The regulations inter alia mandate:

- No messages, images and pictures that directly or indirectly promote any specific brand or tobacco use generally or any matter or statement which is inconsistent with or detracts from the specified warnings should be displayed on the packs<sup>19</sup>.



- The text warning shall appear in not more than two languages used on the package with the warning in one language on the one side and the other language on the other side. This provision is intended to keep the warnings clear and legible and prevent clutter of texts on each side of the pack<sup>20</sup>.
- Each tobacco product package shall also display the name of the product, name and address of the manufacturer or importer of packer, origin, quantity and date of manufacture of the product<sup>21</sup>.

- The warnings on each panel of tobacco packs should not be less than 3.5 cm (in width) and 4 cm (in height) so as to ensure that the warnings are legible, prominent and conspicuous<sup>22</sup>.

## **VII. Protection from Tobacco Industry Interference**

*Nemo debet esse iudex in propria causa*, is an important aspect of natural justice, which says, 'no one ought to be a judge in his own cause'. This principle of justice, equity and good conscience is enshrined in the Framework Convention on Tobacco Control. The Convention, recognizes 'the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts' and recommends that, 'in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.' Further, keeping with the intent of FCTC, the Treaty excludes tobacco industry and expressly bars organizations affiliated to the tobacco industry from being part of inter-sectoral programmes and strategies for tobacco control.

Considering a public interest litigation challenging Governments participation in a tobacco industry event, the Karnataka High Court directed Government of India to withdraw sponsorship extended by the Tobacco Board of India to the tobacco industry sponsored event. Further, a government undertaking was given in the Court to strictly adhere to and implement the provisions of COTPA<sup>23</sup>. The Government also assured to consider adopting a Code of Conduct for public officials to prevent tobacco industry interference in developing and implementing public health policies and programmes related to tobacco control.<sup>24</sup>

## **VIII. Protection from Unfair Trade Practice by a Trader**

The Consumer Protection Act, 1986 requires manufacturers to display information about the content, quality and manner of use of the product. The Act gives every customer an actionable claim against an unfair trade practice adopted by any trader<sup>25</sup>. A customer can file complaint against such unfair trade practice. Further, a consumer can also file a complaint against goods that are hazardous to life and safety when used or being offered for sale to the public are:

- A. in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force<sup>26</sup>;
- B. if the trader could have known with due diligence that the goods so offered are unsafe to the public<sup>27</sup>;

Given the unequivocal scientific evidence linking tobacco as the leading risk factor for majority of the non-communicable diseases, sale of any tobacco pack with a misleading descriptor or message will attract a cause of action under the above provision. While any direct or indirect attempt to advertise and promote any kind of tobacco product also runs contrary to the provisions of the Consumer Protection Act<sup>28</sup>.

## **IX. Protection Against use of Tobacco and Nicotine as Ingredient in Food Items**

The Government enacted the Food Safety and Standards Act, 2006 to replace the archaic Prevention of Food Adulteration Act, 1954. The objective of the new law was to lay down food standards and regulate/monitor the manufacturing, import, processing, distribution and sale of food with the view to ensure availability of safe and wholesome food for human consumption<sup>29</sup>. While implementing the law government notified prohibition on use of tobacco and nicotine as an

ingredient in any food item. Pursuant to the law, all the states and union territories have banned the manufacture and sale of gutkha and pan masala containing tobacco and nicotine while a few have also extended the ban on zarda and pan masala<sup>30</sup>.

## **X. Protection from Negligent Conduct and Cheating**

There have been few tobacco-related criminal cases to date worldwide and therefore little information on cases of the tobacco industry being criminally liable is available. However, if we look at the Indian Penal Code, 1860, it makes a 'negligent conduct with respect to poisonous substance', 'cheating', and cheating with knowledge that wrongful loss may ensue to the person whose interest the offender is bound to protect<sup>31</sup>. In view that protection of the health and wellbeing of the customer is a duty of the manufacturer of a product, the tobacco companies must ensure that their products give out real information about the ingredients. Besides being highly addictive, it is abundantly known that smoking and smokeless tobacco products contain more than 7000 and more than 3000 toxic chemicals respectively several of them responsible for causing cancer<sup>32</sup>.

Tobacco manufacturers must take upon themselves to inform their customers about the toxicity and carcinogenicity of their products. An omission to meet their legal obligations, including to warn the customers, will amount to deceiving such customers, especially youth and vulnerable section of the society who decide to initiate tobacco use<sup>33</sup>. Tobacco companies should be liable for such deception leading to use of tobacco and consequently disease, disability or death of the consumer, as they are by law bound to protect the interest of their customers<sup>34</sup>.

## **XI. Liability of Tobacco Industry in Other Countries**

Various civil litigations initiated by various states in the United States of America, over the last two decades, against the tobacco companies have resulted in almost USD 100 billion in actual payments to recover health expenditures due to tobacco use<sup>35</sup>. Considering the successful civil action against tobacco companies to recover the health cost incurred by the state, several other countries including Israel, Marshall Islands, South Korea and Saudi Arabia have been preparing to sue the tobacco industry. Several Canadian provinces introduced legislation in this regard and are seeking huge compensation from the tobacco companies<sup>36</sup>. A Court last year (June 2015) in Quebec ordered billions of dollars in compensation against tobacco companies for failing to warn smokers about the ill effects of smoking<sup>37</sup>.

## **XII. Civil Liability in India**

There are instances of state action against companies in India for misconduct beginning with the acquisition of the Spinning and Weaving Company in 1950 on account of its mismanagement. Besides the examples of Bank Nationalization in the country the Government has taken action against companies, including by replacing the board of the company with a view to safeguard the interests of shareholders or the public at large<sup>38</sup>. More recently, in March 2014, the Chairman and directors of one of the largest companies in the country were sent to judicial custody for financial impropriety and non-payment of dues as determined by the Securities and Exchange Board of India. In the matter pertaining to one of the worst industrial disasters in India, known as the Bhopal Gas Tragedy, the Apex Court of India allowed the<sup>39</sup> Government of India to represent all the victims and directed the company responsible for the tragedy to "pay a sum of U.S. Dollars 470 million to the Union of India as claimant and for

the benefit of all victims of the Bhopal Gas Leak Disaster under the Bhopal Gas Leak Disaster (Registration and processing of claims) Scheme 1985.<sup>40</sup>

Though the precautionary principle of 'polluter pays' has been abundantly applied in dealing with industries polluting the environment and the judiciary has pioneered civil remedy under class action through public interest litigations, our system has failed in terms of class action to seek damages against a common wrong that affects the public at large<sup>41</sup>. In countries like the US and Canada the tobacco industry has been compelled under the judicial system to pay damages in class action suit. In India, not a single instance is observed against the same industry for the same wrongs committed against the people of India<sup>42</sup>.

### **XIII. Individual Claims Against Tobacco Industry**

With regard to individual claims for damages in civil liability, thousands of individual actions for lung cancer, class actions, consumer fraud cases and defective product or services claims have been successfully made against the tobacco industry in the US, UK, Australia and many other jurisdictions. At a trial in the United States, individual claimants obtain a favourable verdict more than 40% of the time and have collected hundreds of millions of dollars in compensation. In the US, individuals only have to prove that the damage caused was due to using cigarettes, since the findings that cigarettes caused the damage is already established. There have been attempts, few and far between, against the tobacco industry that intended to claim civil damages against tobacco industry by using the consumer protection laws in India<sup>43</sup>. However, in the wake of technical requirements of fixing direct liability of the manufacturer and over emphasis on the defense of 'voluntati non fit injuria,' such claims could not fructify. Such claims generally require painstaking preparation and are perceived as being difficult to pursue because of their legal complexities, the superior resources at the disposal of the tobacco industry and the delaying tactics it employs<sup>44</sup>.

Unlike the court in Florida which granted US \$23.6 billion to the widow of a long-time smoker who died of lung cancer, in India the Consumer Disputes Redressal Commission dismissed a cancer-stricken customs officer's complaint for the award of compensation of Rs one crore (US\$ 170,000) against the largest cigarette manufacturer in India. On the contrary the Commission imposed a fine Rs 20,000 (US\$ 345) on the victim (suffering from cancer caused due to tobacco use) for causing delay in proceedings<sup>45</sup>. Responding to the complainant's allegations, the Indian tobacco giant got four "paid" scientists to file affidavits in the consumer court and argued that the complainant had no proof of purchase of their cigarettes<sup>46</sup>. The four scientists have argued, through independent affidavits, that there is no conclusive proof that cigarette smoking can cause cancer of larynx, a condition that severely damaged the officer's vocal cord, voice box and other areas of throat. The company's lawyer argued, "Cigarettes produced by his clients was of good quality and does not contain any hazardous substance. The complainant has not produced any receipt that shows that he bought cigarettes made by his clients. There is no proof that he ever smoked cigarettes made by his clients<sup>47</sup>. Also, cigarettes are not addictive and the concept of addiction is still not very clear." The court finally dismissed the complaint under the Consumer Protection Act saying that there was merit in the submissions made by the cigarette company<sup>48</sup>. However, the matter appealed by the complainant, who started smoking at 16 years, to the National Consumer Disputes Redressal Commission. It is learnt that the victim died before the National Commission could take a decision on the matter<sup>49</sup>.

#### **XIV. Extent of liability**

Tobacco cannot be categorized as a food item nor can it be termed as medicine. Tobacco companies are the leading producers of death, disease and disability<sup>50</sup>. Therefore, in deciding the extent of liability of a tobacco industry, the fact that tobacco products have no major utility and that they pose danger to the health and life of people should be taken into account<sup>51</sup>.

The key to ensuring compliance with COTPA and FCTC lies in adoption and implementation of the liability clause of the Convention, which states:

“(1) For the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate.”

#### **XV. Duty of Care and Foreseeable Damage**

As discussed above, manufacturers, producers, distributor and sellers of any kind of tobacco products owe both a legal and moral duty against their customers to warn clearly and in unequivocal terms about the fatal consequences of tobacco use<sup>52</sup>. Further, every manufacturer is well aware about the scientific evidence related to the damage on health due to tobacco use and can foresee the damage its products is likely to cause to the individual customer and the society at large. The defense of *volenti non fit injuria* or contributory negligence does not arise as majority of the long term tobacco users start using tobacco as minor<sup>53</sup>. National and global youth tobacco surveillance reports suggest that many tobacco users start even before reaching their teenage. Since, the incubation period for tobacco related diseases may vary from 10 to 20 years, the adverse effects are diagnosed and reported when the tobacco user has reached majority<sup>54</sup>. Therefore, the defense of *'volenti non fit injuria'* must not apply to those who start using tobacco as minors and grow as addicted adults. It may be noted that, COTPA squarely puts an obligation on every tobacco manufacturer, producer, distributor and seller to prevent minors' access to tobacco products<sup>55</sup>.

#### **XVI. Conclusion**

Given the colossal burden of tobacco use on society, environment, health and the economy, the judiciary must rise to the occasion and fix liability of the tobacco companies for each and every violation of legal and moral obligation by them and every death, disability and disease caused due to tobacco use in the country<sup>56</sup>. Courts in this country must now allow the victims of tobacco use to recover damages from tobacco companies under the common law remedy for the tort of *'Negligence'* and *'Fraud/Deceit'* for selling products laced with toxic chemicals and carcinogens to young and vulnerable people without proper and full information about the product<sup>57</sup>. These companies should be liable for the *'Nuisance'* that they aid and propagate through second hand smoke, deforestation and environmental pollution as a result of smoking and use of other forms of tobacco products<sup>58</sup>. Even in case of public smoking, the law should be changed to punish the company whose cigarette is being smoked in a public place for contributory negligence and an abettor to public nuisance<sup>59</sup>.

Additionally, the State as the protector of public welfare and public health must recover from the tobacco industry, the humongous costs incurred on medical services and healthcare for the prevention and cure of diseases and disabilities caused due to tobacco use.<sup>60</sup>

In case of instances where tobacco use has resulted in death and permanent disability, like in the case of victims who died because of cancer caused due to smoking or chewing tobacco, the principle of 'Strict Liability' and 'Absolute Liability' as may be appropriate should be invoked to compensate the victims of tobacco use. In line with the decision of the Supreme Court in the Bhopal Gas Tragedy, each state government should be allowed to recover collective damages on behalf of the victims of tobacco use from all the companies manufacturing, producing, distributing and selling tobacco in that state. Such compensation may be used to meet the health care expenditures of the tobacco victim and other welfare schemes for them and their families.

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28. Section 7 of COTPA, read with the Cigarettes and Other Tobacco Products (Packaging and Labelling) Amendment Rules 2014. Notification GSR 727 (E), dated October, 15, 2014.
29. Article 5.3 of WHO FCTC.
30. Article (12) (e) of the WHO FCTC.
31. Institute of Public Health Vs The State Government of Karnataka and Others. Writ Petition 27692/2010, Institute of Public Health Vs The State Government of Karnataka and Others, High Court of Karnataka
32. Section 2.(r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;—
  - (1) the practice of making any statement, whether orally or in writing or by visible representation which,—
    - (i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
    - (ii) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
    - (iii) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
    - (iv) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;
33. Section 2 (c)(i) of the Consumer Protection Act, 1986.
34. Section 2 (c)(v) of the Consumer Protection Act, 1986.
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38. Section 284 of the Indian Penal Code, 1860: S. 284. Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person, Or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, (emphasis added) shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.
39. Section 415 of the Indian Penal Code, 1860: S. 415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat". (emphasis added)
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  55. Bishop v The Commonwealth of Australia (Administrative Appeals Tribunal, A84/109, 14 October 1985); Carroll v Melbourne Metropolitan Transit Authority (Work care claim, Victorian Accident Compensation Tribunal, July 1988)
  56. Douglas C, Davis R, Beasley J. Epidemiology of the third wave of tobacco litigation in the United States, 1994-2005. Tobacco Control. 2006;15(Suppl 4):iv9-16. doi:10.1136/tc.2006.016725
  57. Howard A. Engle, M.D. v. Liggett Group, Inc., 945 So. 2d 1246, 1276-77 (Fla. 2006) (Engle III)
  58. Latin: To the consenting, no injury is done. In the law of Negligence, the precept that denotes that a person who knows and comprehends the peril and voluntarily exposes himself or herself to it, although not negligent in doing so, is regarded as engaging in an 'assumption of the risk' and is precluded from a recovery for an injury ensuing therefrom. (<http://legal-dictionary.thefreedictionary.com/Volenti+Non+Fit+Injuria>)
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