[2023] 15 S.C.R. 113 : 2023 INSC 938

CASE DETAILS

M.A BIVIJI

v.

SUNITA & ORS.

(Civil Appeal No. 3975 of 2018)

OCTOBER 19, 2023

[HRISHIKESH ROY AND MANOJ MISRA, JJ.]

HEADNOTES

Issue for consideration: The complainant alleged negligence on the part of a Hospital – The main claim of negligence that the complainant attributed was that the forced *Nasotracheal Intubation* (NI) procedure resulted in her developing Grade-IV Subglottic Stenosis (i.e., narrowing of upper airway between the vocal folds and lower border of cricoid cartilage) in the trachea – Subsequently, the same led to various severe complications.

Negligence – Medical Negligence – The NCDRC concluded that the negligence charge regarding the unjustifiable *'NI'* procedure was proved – The act of replacing the existing *Tracheostomy Tube* (TT), with *'NI'* was held to have been an avoidable course of action that was other than what should have ordinarily been done in that situation – The NCDRC awarded complainant a compensation of Rs. 6,11,638/- @ 9% p.a. for the medical expenses she incurred at Hospital – Propriety:

Held: (1) Taking into consideration the medical literature on record as well as the expert medical committee report presented by the RML Hospital, it is reasonable to conclude that subglottic stenosis & subsequent trauma in the trachea is not an uncommon phenomenon with respect to a patient that has suffered serious injuries in a road accident – In addition, there tends to be a higher risk element of developing an injury if intubation is done in an emergency situation or multiple times – It could also be a result of being subjected to intubation for a prolonged period; (2) In the instant case, the patient was treated and underwent different procedures

at multiple hospitals – Therefore, there is a possibility that these medical complications could have arisen at any of these hospitals or places where the patient underwent treatment; (3) The medical report available in this case i.e., the RML Hospital Committee Report did not attribute any negligence to Hospital in question or the doctors with respect to any of the charges levelled against them – If the *'NI'* procedure had been conducted in a negligent manner or was a poor medical decision, it is likely that the RML Hospital Committee Report would have mentioned the same – However, no such observation was made either; (4) The medical team at Hospital in question was able to show that the *'NI'* procedure was carried out only after due consideration – The existing *'TT'* was removed after the bronchoscopy showed normalcy in the airways & trachea of the patient – It was expected that the patient would be able to breathe normally without any support after *'TT'* decannulation – However, a *stridor* was observed in the airways of the patient, after the said decannulation took place – In light of the same, an alternative course of treatment in the form of an *'NI'* procedure was opted for as a temporary measure – There is nothing to show that the procedure conducted was outdated or poor medical practice – Resultantly, there was no breach of duty of care at Hospital in question or on part of the doctors – The charge of negligence is, therefore, not proved – Impugned judgment set aside. [Paras 50, 51, 52, 53, 56]

Negligence – Medical Negligence – Essential ingredients for determination:

Held: The three essential ingredients in determining an act of medical negligence are: (1) a duty of care extended to the complainant, (2) breach of that duty of care, and (3) resulting damage, injury or harm caused to the complainant attributable to the said breach of duty – However, a medical practitioner will be held liable for negligence only in circumstances when their conduct falls below the standards of a reasonably competent practitioner. [Para 36]

Negligence – Medical Negligence – A line of treatment undertaken should not be of a discarded or obsolete category in any circumstance:

Held: Due to the unique circumstances and complications that arise in different individual cases, coupled with the constant advancement in the medical field and its practices, it is natural that there shall always be different

opinions, including contesting views regarding the chosen line of treatment, or the course of action to be undertaken – In such circumstances, just because a doctor opts for a particular line of treatment but does not achieve the desired result, they cannot be held liable for negligence, provided that the said course of action undertaken was recognized as sound and relevant medical practice – This may include a procedure entailing a higher risk element as well, which was opted for after due consideration and deliberation by the doctor – Therefore, a line of treatment undertaken should not be of a discarded or obsolete category in any circumstance. [Para 37]

Negligence – Medical Negligence – A higher threshold limit must be met to hold a medical practitioner liable for negligence:

Held: To hold a medical practitioner liable for negligence, a higher threshold limit must be met – This is to ensure that these doctors are focused on deciding the best course of treatment as per their assessment rather than being concerned about possible persecution or harassment that they may be subjected to in high-risk medical situations – Therefore, to safeguard these medical practitioners and to ensure that they are able to freely discharge their medical duty, a higher proof of burden must be fulfilled by the complainant – The complainant should be able to prove a breach of duty and the subsequent injury being attributable to the aforesaid breach as well, in order to hold a doctor liable for medical negligence – On the other hand, doctors need to establish that they had followed reasonable standards of medical practice. [Para 38]

LIST OF CITATIONS AND OTHER REFERENCES

Jacob Mathew vs. State of Punjab (2005) 6 SCC 1 : [2005] 2 Suppl. SCR 307; *Kusum Sharma vs. Batra Hospital* (2010) 3 SCC 480 : [2010] 2 SCR 685; *Savita Garg v. Director, National Heart Institute* (2004) 8 SCC 56 : [2004] 5 Suppl. SCR 359 – relied on.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL APPELLATE JURISDICTION: Civil Appeal No.3975 of 2018.

From the Judgment and Order dated 16.02.2018 of the National Consumer Disputes Resolution Commission, New Delhi in Consumer Case No.48 of 2005.

With

C.A. No.4847 of 2018 and 6917 of 2023.

Appearances:

Fanish Kumar Rai, Gaurav Sahdev, Shantanu Sagar, Vinod Kumar, Rajesh Kumar, Keshav Sharma, Shakul R. Ghatole, Sudhanshu S. Choudhari, Advs. for the appearing parties.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

HRISHIKESH ROY, J.

Delay condoned.

2. The Civil Appeals have been filed under Section 23 of *The Consumer Protection Act, 1986,* (hereinafter referred to as the, '*Act, 1986')* assailing the impugned decision passed on 16.02.2018 by the National Consumer Disputes Redressal Commission (hereinafter, 'NCDRC') in Consumer Case No. 48 of 2005 filed by Mrs. Sunita Parvate. The NCDRC directed Suretech Hospital and Research Centre Private Limited, a Hospital in Nagpur, Dr. Nirmal Jaiswal, Chief Consultant and Intensive Care Unit In-charge, at Suretech Hospital, Dr. Madhusudan Shendre, ENT Surgeon at Suretech Hospital, and Dr. M. A. Biviji, Radiologist at Suretech Hospital to jointly and severally pay Rs. 6,11,638/- as compensation for medical negligence to Mrs. Sunita (Complainant) with 9 % simple interest from the date of filing of the complaint till the date of actual payment, within six weeks. Additionally, the NCDRC directed that Rs. 50,000/- to be paid to Mrs. Sunita as cost towards litigation expenses. The medical negligence was proved on account of the unjustifiable and forceful performance of *Nasotracheal Intubation* (hereinafter, *'NI')* procedure on Mrs. Sunita on 13.05.2004, at Suretech Hospital. The *'NI'* procedure entails inserting an endotracheal tube through the patient's nose, to assist in breathing.

3. The Civil Appeal No. 3975 of 2018 has been filed by Dr. M.A. Biviji denying any role in the alleged medical negligence during treatment of Mrs. Sunita at Suretech Hospital. The Civil Appeal (Diary No.21513 of 2018) has been filed by Suretech Hospital, Dr. Nirmal Jaiswal, and Dr. Madhusudan Shendre completely denying that any negligence was

committed during Mrs. Sunita's treatment in Suretech Hospital. Whereas Mrs. Sunita filed Civil Appeal 4847 of 2018 seeking enhancement of compensation ordered for medical negligence during her treatment. She further prayed for enhancement of 9% interest p.a. to 18% interest p.a. The claimant, Mrs. Sunita filed Consumer Case 48 of 2005 before the NCDRC seeking Rs. 3,58,85,249/- i.e., Rs. 3.58 crores. However, the NCDRC only awarded her Rs. 6,11,638/- @ 9% simple interest as compensation for the medical expenses she incurred. She was further entitled to Rs. 50,000/- as cost for her litigation expenses.

Complaint before NCDRC:

4. At around 04:30 PM on 05.05.2004, Mrs. Sunita was taken to Gondia hospital within 15 minutes of meeting with a serious car accident near Gondia, resulting in multiple injuries. She suffered from a mandibular (lower jaw) fracture on the left side, and a clavicle (collar bone) fracture on the right side. As an emergency measure, Dr. Vimlesh Agarwal conducted a *tracheostomy* procedure i.e., creating an opening in the front part of the neck to insert a tube into Mrs. Sunita's windpipe (trachea) to assist breathing. On 06.05.2004 at around 12:30 AM, the complainant/patient was shifted from Gondia Hospital to the ICU in Suretech Hospital, Nagpur under Dr. Nirmal Jaiswal's (ICU In-charge) supervision. Mrs. Sunita was put on a ventilator through her *Tracheostomy Tube* (hereinafter, *'TT'*), which was weaned off on 08.05.2004. On 11.05.2004, Dr. Vinay Saoji, Plastic Surgeon, at Suretech Hospital performed *'Mandibular Bracing Surgery'* to correctly set Mrs. Sunita's left-side *mandibular* fracture in place. The surgery was performed through *'TT'*, horizontally and vertically wiring both the upper and lower jaws.

5. The complainant/patient alleged that on 13.05.2004, Dr. Nirmal Jaiswal, Dr. Madhusudan Shendre, Dr. M.A Biviji performed *Bronchoscopy* to check Mrs. Sunita's airways and for evaluating her Larynx and Trachea. The complainant further claimed that even though the *Bronchoscopy* showed a normal air-passageway, indicating her ability to breathe normally through the existing *'TT',* Dr. Nirmal Jaiswal, and Dr. Madhusudan Shendre, removed the *'TT'* and forcefully performed *'Nasotracheal Intubation'* (hereinafter *'NI'*) i.e., inserting an Endotracheal tube through the nose to facilitate breathing.

6. According to the patient, until the *'NI'* procedure was conducted, she was being fed through a *Ryle's Tube* i.e., a tube inserted through the nose to the stomach. However, to accommodate the *'Nasotracheal Tube'* (Hereinafter, *'NT')*, the *Ryle's Tube* (Tube inserted through the nose to feed the patient) had to be removed. Subsequently, she was given liquid oral feed through her mouth. The liquid feed started passing into her respiratory tract, and got collected in her lungs leading to *Frank* pus and severe infection, ultimately causing *'Severe Septicemia'*. As per the patient, the food entered the respiratory tract only due to the inflated cuff of the *'NT'*. The pus started leaking through the stitched *'tracheostomy'* wound. As a result of the injuries sustained in the *subglottic* region, the vocal cords of the patient were also paralysed.

7. On 25.05.2004, Dr. Nirmal ordered a *'Barium Swallow Test'* i.e., a test conducted to check for any abnormalities in the digestive tract of the patient. It was alleged that even though the said test was resisted by the family of the complainant (in particular, a relative of the complainant – Dr. Kalidas Parshuramkar) due to a possible danger of developing *asphyxia,* the *'Barium Swallow Test'* was done forcefully without the presence of any doctor, specifically the radiologist i.e., Dr. M. A. Biviji. Mrs. Sunita claimed to have been forcefully administered two glasses of *Barium Sulphate* i.e., the solution used to conduct the aforesaid test. It was alleged that upon consumption of the solution, she experienced extreme breathlessness and almost died. She was saved due to the efforts of her relative – Dr. Kalidas Parshuramkar, who took her to the suction room to remove the aspirated solution from her *tracheostomy* wound and lower trachea.

8. The complainant, being unsatisfied with her treatment at Suretech hospital sought a discharge. On 27.05.2004, she flew to Mumbai, to meet Dr. Sultan Pradhan in Prince Aly Khan Hospital who advised her to first treat life-threatening conditions like difficult respiration, *'Severe Septicemia',* and *'Severe Thrombocytopenia'*. Dr. Pradhan reinserted the *'TT'* without a cuff through the pre-existing tracheostomy wound to aid respiration. The complainant alleged that even Dr. Pradhan questioned the *'NI'* procedure, opining that all subsequent complications that arose were iatrogenic in nature.

9. Upon being advised rest, Mrs. Sunita flew back to Nagpur, and got herself admitted to Shanti Prabha Nursing Home. On 03.06.2004, Dr. Swarankar performed a *Fiber Optic Bronchoscopy*, which revealed two openings in Mrs. Sunita's Trachea at the *subglottic* level. A false passage was created, which caused the food to pass into her trachea. Mrs. Sunita claimed that the unnecessary and forced *'NI'* procedure was the only reason why her *subglottic* region was injured leading to multiple serious medical complications. On 04.06.2004, Mrs. Sunita was discharged from Shanti Prabha Nursing Home, Nagpur. Subsequently, she stayed at her home in a special medically-equipped room until 02.07.2004 when she flew to Mumbai. On 03.07.2004, Dr. Pradhan conducted a *laryngoscopy* and *pharyngoscopy* revealing complete *laryngostenosis* i.e., narrowing of the airway. Upon Dr. Pradhan expressing his inability to perform surgical intervention, Mrs. Sunita underwent a 3D CT Scan for her larynx on 05.07.2004 at Jaslok Hospital in Mumbai. The scan indicated a 3.5 cm *subglottic stenosis*. On 07.07.2004, Mrs. Sunita went to Dr. Krishnakant B. Bharagava and Dr. Samir K. Bhargava, ENT specialists, who conducted *Flexible Fiberoptic Bronchoscopy* to observe signs of injuries in the *subglottic* region. Subsequently, the patient was referred to Dr. Ashutosh G. Pusalkar, ENT at Leelavati Hospital in Mumbai. Dr. Pusalkar expressed his inability to perform any immediate surgical intervention due to the severity of injury in the *subglottic* region. He advised Mrs. Sunita to maintain the *'TT'* and undergo proper care for the stoma wound for around 6 months. Eventually, on 30.01.2005, Dr. Pusalkar performed *tracheoplasty* i.e., tracheal reconstruction surgery. A 3.5 cm long *subglottic stenotic* segment was excised in the surgery. Resultantly, the complainant had to live with a shortened windpipe. On 14.03.2005, the *'TT'* was removed after which the doctors realised that Mrs. Sunita's speech could never be restored.

10. Thereafter, Mrs. Sunita filed Consumer Case No. 48 of 2005 under Sections 12 and 21 of *Act,* 1986 before the NCDRC on 16.05.2005 alleging medical negligence in her treatment at Suretech Hospital, resulting in permanent damage to her respiratory tract and permanent voice-loss, altering her life forever. Through the complaint, she sought Rs. 3,58,85,249/- @ 18% interest p.a. as compensation against loss and injury suffered by her and her family. The complainant claimed that due to Dr. Nirmal Jaiswal,

Dr. Madhusudan Shendre, and Dr. M.A Biviji's negligence she suffered from *'Severe Septicemia'*, i.e., a blood stream infection resulting from bacterial infection in her respiratory tract. She claimed that the infection was caused due to oral aspiration i.e., food and liquid entering her airways, and getting deposited in her lungs, leading to *Frank pus.* She further alleged that the negligent treatment at Suretech Hospital, resulted in her developing *'Hemorrhagic Peteche'* all over her body due to *'Severe Thrombocytopenia'* i.e., her platelet count falling to dangerously low levels. The complainant alleged negligence on the part of Suretech Hospital to not conduct regular blood tests to identify significant fall in her platelet count at an appropriate time and waited for her platelet levels to fall to a dangerously low level, i.e., 26,000 on 20.05.2004, before taking any action. Mrs. Sunita also claimed her repeated complaints of blurred vision were ignored, thereby resulting in vision loss. The main claim of negligence that the complainant attributed in the Consumer Case No. 48 of 2005 is that the forced *'NI'* procedure resulted in her developing Grade-IV *Subglottic Stenosis* (i.e., narrowing of upper airway between the vocal folds and lower border of cricoid cartilage) in the trachea. Subsequently, the same led to various severe complications. As per the complainant, the unnecessitated and forcefully-conducted *'NI'* procedure was the only reason she suffered from voice-loss and permanent deformity in her respiratory tract. The *'NI'* procedure was carried out, despite multiple failures in decannulating the *'TT'*.

Rebuttalto the Consumer Complaint:

11. Dr. M.A Biviji claimed that being a radiologist, he did not have any role in conducting Mrs. Sunita's *Bronchoscopy* or *'NI'* on 13.05.2004. Relying on Mrs. Sunita's discharge bill dated 26.05.2004, he averred that Dr. Rajesh Swarnakar as the pulmonologist and bronchoscopist at Suretech Hospital, conducted the aforesaid *Bronchoscopy* and *'NI'* procedure.

12. Dr. M.A Biviji, Dr. Nirmal Jaiswal, and Dr. Madhusudan Pradhan claimed that the complaint is not maintainable as the complainant has not impleaded necessary parties i.e., Dr. Swarnakar, who conducted both the Bronchoscopy, indicating normalcy in Mrs. Sunita's airways and the *'NI'* procedure, as well as Dr. Ambade and Dr. Arti Wanare, Ophthalmologists, and Dr. Vinay Saoji, Plastic Surgeon who conducted the *'Mandibular Bracing Surgery'*.

13. According to Dr. Biviji, performing the *'Barium Swallow Test'* was essential in order to understand why the liquid feed was coming out of Mrs. Sunita's tracheostomy wound. He elucidated how the test was a routine procedure conducted even in newborn babies to enquire about any abnormality in the passage between the windpipe and the food-pipe. He stated that the solution used for the said test i.e., the *Barium Sulphate* solution is a non-toxic, and harmless substance, not posing any danger even in case of it being aspirated. He stated that he was present during the test, as it cannot be conducted without a radiologist's presence. Their presence is needed for the multiple X-rays that need to be taken during the test. Further, the test cannot be conducted without the patient's cooperation, as they are instructed to swallow the *Barium* solution. After the test, as a part of the routine procedure, appropriate steps were taken to remove the *Barium Swallow Solution* that was aspirated by the patient, using a suction machine.

14. Dr. Biviji along with Dr. Nirmal Jaiswal, Dr Madhusudan Shendre, and Suretech Hospital claimed that the complaint had been filed at the behest of Dr. Kalidas Parshuramkar (Mrs. Sunita's relative) who is a third party apart from being a PG diploma student in Gynecology. It was stated that Dr. Parshuramkar lacked the expertise to understand the treatment, yet constantly interfered, and misinformed the patient about the *'Barium Swallow Test'*, and other treatments being carried out, thereby creating unnecessary panic. The doctors prayed for the complaint to be referred to a panel of medical experts in order to determine whether any negligence was committed or not.

15. According to Dr. Jaiswal, Mrs. Sunita met with a serious accident after which a *'TT'* was done in the Gondia Hospital, only after an unsuccessful *Endotracheal Intubation* attempt. The patient was hospitalized in a semi-comatose state, and then immediately put on a ventilator by Dr. Jaiswal. He stated that due care was taken towards Mrs. Sunita's treatment. A neuro-surgeon treated her for head-injuries, and a plastic surgeon treated her for *mandibular* fractures and *oesopharyngeal* trauma. Dr. Jaiswal claimed he was not responsible for removing the *Ryle's Tube* or forcefully performing the *'NI'* procedure either. It was propounded that it is common for road accident patients to develop *sepsis* due to contamination of their wounds. Mrs. Sunita's complete blood count report *WBC*-16700 on 06.05.2004 indicated *neutrophilia-84%* i.e., showing signs of infection at the time of

her admission to Suretech Hospital. With respect to *thrombocytopenia,* immediate action was taken and Mrs. Sunita was given platelet concentrates on an everyday basis. Additionally, a bone-marrow examination was done to rule out any other possibility of damage to the platelets. On 27.05.2004, Mrs. Sunita's platelets started rising gradually and reached up to 73,000 levels. Dr. Jaiswal claimed that it is possible for a *tracheal* stenosis to be discovered in the future, arising out of serious injuries sustained in a road accident. The doctors contented that the subsequent medical complications suffered by Mrs. Sunita could have also come to effect between 04.06.2004 to 03.07.2004 when she was being treated in her own house under Dr. Kalidas Parshuramkar's supervision.

16. Dr. Madhusudan Shendre claimed that on Dr. Jaiswal's instructions, he attempted *'TT'* decannulation (i.e., Removing *'TT'*) on 11.05.2004 since *'TT'* removal had become necessary. As the crisis resulted from Mrs. Sunita being involved in a vehicular accident, she was put on a ventilator, which was weaned off on 08.05.2004. Removing the *'TT'* would enable a normal respiratory passage. He further reasoned that long-term intubation posed a risk of infections and complications like *stenosis*. The *Mandibular surgery* was successfully done to fix Mrs. Sunita's lower jaw. Early in the morning, Dr. Shendre removed the *'TT'* and covered Mrs. Sunita's stoma wound, when she was in sustained bandage. He claimed that Mrs. Sunita started experiencing breathing difficulty at night. Therefore, the *'TT'* was reinserted to support her airway. A re-examination of the *Tracheostomy* wound indicated that the trauma to the tracheal wall extended posteriorly and superiorly, resulting in the anterior flap of the tracheal wall getting sucked during inspiration, thereby, obstructing tracheal lumen. A need to conduct *tracheoplasty* in the future was suggested, in order to avoid *stenosis.* However, as it could not be conducted immediately, an *'NI'* procedure was suggested as an alternative involving *'NT'* as a temporary stent. The *'NT'* stent was expected to serve the purpose of holding the anterior flap and supporting the weakened anterior tracheal wall, preventing a collapse in the lumen, which was causing a problem in decannulation of the *'TT'*. Upon the flap and tracheal wall healing completely, the *'NT'* would have been removed restoring normal airway. Therefore, Dr. Rajesh Swarnakar conducted the requisite *'NI'* procedure.

NCDRC Judgment

17. In relation to the main allegation in the complaint regarding the *'TT'* unnecessarily being replaced by *'NI'*, even though the 1st *Bronchoscopy* conducted on 13.05.2004, revealed normalcy in Mrs. Sunita's airways, the NCDRC held that negligence was proved. It was found that given the patient was breathing normally through the *'TT'*, there was no basis to consider replacing it with *'NI'*. It was observed that the *'TT'* is resorted to when there is a need to provide longer respiration assistance as opposed to *'NI'*, which is more of a temporary measure. Mrs. Sunita was already receiving breathing assistance through the *'TT'* having already been performed at Gondia hospital on 05.05.2004. After which, she was shifted to Suretech Hospital in a semi-comatose state at around 12:30 AM on 06.05.2004. She was put on a ventilator as an urgent measure, which was weaned off on 08.05.2004. Even the *Bronchoscopy* conducted on 13.05.2004 indicated a normal larynx and trachea. Thus, it is established that Mrs. Sunita was recovering well, breathing through the *'TT'* without any issue. Thus, *'NI'* was performed without any basis or justification, especially as a short-term measure, even though the patient was responding well to her existing treatment. It was further reasoned that even though there is a need to take necessary long-term steps to ensure the patient's respiration is restored to its earlier normal levels, but the same cannot be done unreasonably, in a tearing hurry, especially without any impending need. Thereby, the NCDRC concluded that the negligence charge regarding the unjustifiable *'NI'* procedure was proved. The act of replacing the existing *'TT'*, with *'NI'* was held to have been an avoidable course of action that was other than what should have ordinarily been done in that situation.

18. The NCDRC further observed that the expert medical committee report formulated by RML Hospital was silent about the baseless and forced *'NI'* procedure that was carried out, even though the *Bronchoscopy* report indicated that the patient had a normal airway. The expert committee report mentioned that the *'TT'* was only removed on 13.05.2004, after the said *Bronchoscopy* report. Thereafter, Mrs. Sunita was able to breath, but a minimal stridor was observed.

19. The NCDRC held that the submissions made by Dr. Madhusudan Shendre are inconsistent in relation to removal of the *'TT'*, and covering the

stoma wound, and observing normalcy in the morning, whereas he averred observing the patient having breathing difficulty at night. Resultantly, Dr Madhusudan Shendre felt that a re-examination was necessitated. He stated that the re-examination revealed damage to the tracheal wall, necessitating *Tracheoplasty* in the future. The NCDRC rejected the doctor's suggestion of proceeding with *'NI'* as a temporary measure on account of a lack of clear timeline. It was held that there was absolutely no justification for opting for *'NI'*, especially when the patient was recovering well.

20. The NCDRC however concluded that Mrs. Sunita's claim with respect to negligence leading to *Thrombocytopenia,* was not proved. The complainant's platelet count on 06.05.2004 was 1,73,000, well within the normal range. It significantly dropped down to 26,000 on 20.05.2004. The NCDRC observed that usually decisive interference starts when the levels drop down to 20,000, however, in Mrs. Sunita's case, intervention was done even when her platelet levels dropped down to 26,000. The NCDRC further observed that additionally, a bone-marrow examination was done. The *intravenous immunoglobulin* was planned in advanced for the next 5 days. Eventually, Mrs. Sunita's platelet count was observed to have started increasing, rising to 73,000 on 27.05.2004. The same was said to have been corroborated with her discharge slip. The NCDRC relying on the expert committee report held that no negligence was proved in handling the *Septicemia* and *thrombocytopenia.*

21. The NCDRC also rejected the charges of negligence with respect to the *'Barium Swallow Test'*. The decision of conducting the *'Barium Test'* was held to be a clinical one. As food was leaking from Mrs. Sunita's trachea stoma wound, an investigation to understand the underlying cause was necessitated. It was held that *Barium Sulphate* is a non-toxic solution, posing no serious danger to the complainant. Mrs. Sunita failed to prove the charge regarding the test being conducted without a radiologist's presence.

22. The NCDRC held that the negligence charge with respect to vision loss and the hospital ignoring Mrs. Sunita's complaints about blurred vision, is not proved. When she was admitted to Suretech Hospital, she was in a critical condition, requiring ICU care and ventilator support. So, the NCDRC rejected the suggestion that she was in a position to complain about blurred vision. Further, tests conducted by two different Ophthalmologists

at Suretech Hospital revealed normal retina. Vision became an issue only after two months, in July 2004, when Mrs. Sunita was diagnosed with *left homonyms, quadrantanopia*. The expert committee report held that such issues relating to vision-loss are commonly observed after serious road accidents.

23. The NCDRC concluded that just based on a single act of negligence, wherein, unjustifiably, *'NI'* was forcefully performed, replacing the existing *'TT'*, it is not possible to conclude that subsequent resultant medical complications, including permanent respiratory tract deformity and voice-loss suffered by Mrs. Sunita were a consequence of that very single act of negligence. The NCDRC observed that the risk of complications could not have been pin-pointed. The subsequent medical complications could have occurred anywhere, as the complainant was treated at various hospitals by multiple doctors, and also lived in her own house from 04.06.2004 to 03.07.2004. The complainant was a victim of a serious road accident, wherein, it is common for various serious infections and complications to occur. The Complainant failed to produce any evidence proving that Dr. Pradhan opined that the complications were only a result of the forced *'NI'*. Relying on the expert committee, it was held that subsequent medical complications, and infections are common after serious road accidents.

24. The NCDRC awarded Mrs. Sunita a compensation of Rs. 6,11,638/- @ 9% p.a. for the medical expenses she incurred at Suretech Hospital. Reasoning, that as only a single act of negligence is proved, that too not attributable to all subsequent medical complications, it is only fair to announce compensation against the medical expenses incurred at Suretech Hospital. The NCDRC further directed that Rs. 50,000/- be paid to Mrs. Sunita as cost towards her litigation expenses.

PLEADINGS ASSAILING THE IMPUGNED NCDRC JUDGMENT:

25. Assailing the NCDRC Judgment dated 16.02.2018, Mrs. Sunita filed Civil Appeal 4847 of 2018, seeking enhancement of Rs. 6,11,638/- compensation. She also claimed a higher rate of interest at 18% instead of the awarded 9% interest p.a. The patient claims that though the NCDRC was correct in attributing medical negligence with respect to the unjustified forced *'NI'* procedure, replacing the existing *'TT',* the NCDRC erred in holding

that there is no direct link attributable to the said act of negligence leading to subsequent prolonged medical complications, permanent respiratory damage, and voice-loss. Mrs. Sunita claims that the sole reason why she lost her voice and suffered from tracheal stenosis, is the forced *'NI'*. Though the *Bronchoscopy* report on 13.05.2004 indicated that she has a normal airway enabling normal breathing through the existing *'TT'*, the *'NI'* was yet conducted forcefully, resulting in a tracheal injury. Furthermore, the *'NI'* procedure was undertaken despite multiple failed attempts to decannulate the *'TT'*. Resultantly, the patient developed *Frank Pus*. She also further suffered from *'Severe Septicemia'*, directly attributing it to her tracheal injury. Moreover, Mrs. Sunita averred that Suretech Hospital's discharge summary does not mention any details about the *'NI' procedure,* indicating an attempt to hide the commission of the aforesaid negligent act.

26. On 30.01.2005, Dr. A.G. Pusalkar performed *tracheoplasty* on Mrs. Sunita, wherein, a 3.5cm Grade-IV *subglottic stenotic* segment was excised. As a result, she now has to live permanently with a shortened windpipe. It is further claimed that as per medical science, 95% *subglotticstenosis* cases are acquired, and out of those about 90% cases result from traumatic *'NI'*. Resultantly, it is claimed that she has to live with a life-long respiratory problem, with a danger of aspiration, causing a potential life-threatening situation like asphyxia. As a result, Mrs. Sunita claimed Rs. 75,00,000/- for the deformity of her respiratory tract, and another Rs. 75,00,000/- for losing her voice. She seeks another Rs. 5,00,000/- for permanent disfiguration of her neck. She further sought Rs. 50,00,000/- as compensation towards the mental and physical suffering she had to undergo due to her prolonged treatment. Rs. 15,00,000/- was sought for the impact her disability had on her husband. Rs. 25,00,000/- was claimed for the mental stress and agony caused to her husband. Rs. 20,00,000/- was claimed collectively for the suffering undergone by the patient's children due to her disability.

27. Assailing the impugned decision passed by the NCDRC, Dr. M.A Biviji filed Civil Appeal 3975 of 2018 claiming that the only charge of negligence against him, which was with respect to the *'Barium Swallow Test',* was not proved. Also, assailing the same impugned decision by the NCDRC, Suretech Hospital, Dr. Nirmal Jaiswal, and Dr. Madhusudan Shendre filed Civil Appeal (Diary) No. 21513 of 2018. It was averred that

the expert medical board formed by Ram Manohar Lohia Hospital did not find any negligence with respect to performing the *'NI'* procedure, replacing it with the existing *'TT'*. No other subsequent hospital in which the complainant got treated post her discharge from Suretech Hospital or any of the doctors who treated her subsequently, made a causal connection between the *'NI'* procedure and the medical complications, and tracheal stenosis and injuries. No hospital or medical record of the complainant indicates that the *'NI'* procedure was wrong. It is further claimed that the complainant has failed to produce any evidence substantiating the aforesaid negligence. It is stated that despite the NCDRC concluding that such injuries and subsequent medical complications are commonly found in serious cases of road accidents, the act of replacing the *'TT'* with the *'NI'* procedure was held to be negligent. It is further contended that the NCDRC did not find any causal connection between the *'NI'* procedure conducted on 13.05.2004, after removing the *'TT'* and the alleged tracheal injuries and the subsequent medical complications.

28. It is contended that Dr. Nirmal Jaiswal, being the ICU in-charge, ensured immediate care, and she was consulted by multiple specialists. A neuro-surgeon saw her for head-injuries, ENT specialist conducted her *Mandibular Fracture Surgery.* Due care was taken in providing Mrs. Sunita treatment, as also observed by the medical expert board. Mrs. Sunita failed to prove a breach of duty, and any resultant causal damage. As per the medical board, as there was no negligence, and satisfactory treatment was given, Dr. Nirmal, Dr. Madhusudan Shendre, Dr. Biviji carried out their duty diligently. Moreover, it is also averred that the NCDRC failed to consider that it was Dr. Rajesh Swarnakar, Pulmonologist and Bronchoscopist at Suretech Hospital, who conducted *Bronchoscopy* and *Bronchoscopy* guided *'NI'* on 13.05.2004. Dr. Ajay Ambade, and Dr. Arti Wanare, Ophthalmologists at Suretech Hospital conducted Mrs. Sunita's eye-checkup. Dr. Vinay Saoji, Plastic Surgeon, performed the *Mandibular Surgery.* However, the complainant did not implead them as necessary parties, hence, the complaint is not maintainable in the first place. It is further contended that even though the medical bill raised at Suretech Hospital was Rs. 95,260/-, the NCDRC awarded Mrs. Sunita Rs. 6,11,638/- as medical expenses against the treatment undergone at Suretech hospital. Additionally, Rs. 50,000/- was directed to be paid as cost towards Mrs. Sunita's legal expenses.

29. Dr. Madhusudan Shendre elucidated that after doing a thorough evaluation of Mrs. Sunita's condition found that all parameters were normal for decannulating the *'TT'*. However, due to the injuries suffered from the road accident, a wide incision was done during the emergency *'TT'* procedure conducted at Gondia hospital. Thereby, the desired decannulation result was not attained. Though, there was an expectation for the patient to return to normal breathing without support, a *stridor* was found once the *'TT'* was removed. A reasonably plausible cause of the *stridor* would either be injuries suffered in the road accident or the emergency *'TT'* procedure conducted at Gondia Hospital. Such injuries ultimately lead to *subglotticstenosis.* Dr. Madhusudan Shendre had multiple options to choose from to treat the *stridor,* including, i) Long-term *Tracheostomy*, ii) placement of airway stent. Amongst various stenting options, Dr. Madhusudan Shendre went with the *'NI'* procedure. The *'NI'* procedure was also chosen to use it as a temporary stent to provide support to the weakened trachea walls, to help in healing of the tracheal injuries, while also aiding breathing at the same time. It is contended that choosing one form of treatment amongst other available options doesn't amount to negligence. Furthermore, even *'TT'* procedures have their own risks, such as failure to heal, collapsed windpipe, risk of developing stenosis. The resultant medical complications and the injuries suffered have no causal link with the *'NI'* procedure. The complainant was treated in multiple hospitals and was even at home for a month. The tracheoplasty surgery was performed after almost a year. The complications could have arisen due to various factors. It is impossible to establish any direct link with the *'NI'* procedure.

DISCUSSION/REASONING

30. We have considered the submissions of the complainant as well as the doctors. We have also carefully perused the materials on record. The NCDRC held that the charges alleging negligence with respect to Mrs. Sunita's complaints about blurred vision, negligence leading to *thrombocytopenia* i.e., platelet levels falling significantly to dangerously low levels, and negligence with respect to the *'Barium Swallow Test'* causing breathlessness in Mrs. Sunita, are not proved.

31. Two different ophthalmologists at Suretech hospital attended to Mrs. Sunita and found a normal retina. As per the expert medical committee's

report, even the CT scan/Orbit and MRI Scan revealed a normal retina. Additionally, although decisive care intervention ordinarily begins when platelet levels drop below 20,000, an interference was done when the platelet levels fell below 26,000 in the case of Mrs. Sunita. *Intravenous immunoglobulin* was also planned 5 days in advance. Further, a bone-marrow examination was conducted to additionally investigate the underlying cause(s). Gradually, with the aforementioned treatment, the platelet levels began to increase rapidly as well. In fact, the expert committee observed that the hospital appropriately managed Mrs. Sunita's *septicemia* and *thrombocytopenia.*

32. With respect to the decision to conduct the *'Barium Swallow Test',* it is important to note that the clinical test was mandated in Mrs. Sunita's case to investigate why liquid feed being administered orally was leaking through the wound and getting aspirated. This test was routine in nature and carried out even in infants to determine any irregularities with respect to their digestive tracts. Moreover, the solution used i.e., *Barium Sulphate,* was non-toxic in nature and therefore, hardly posed any danger to patients. Therefore, we find that the NCDRC rightfully held that the aforesaid charges were not proved. These do not merit any further discussion either.

33. In sum and substance, the main contention arising in the aforesaid Civil Appeals that needs to be addressed is whether the act of conducting the *'NI'* procedure on Mrs. Sunita on 13.05.2004 at Suretech hospital, while removing the existing *'TT'* after the *Bronchoscopy* report indicated normalcy in Mrs. Sunita's airways, amounts to negligence or not. In case the answer arrived at is in the affirmative, it needs to be further ascertained whether the subsequent medical complications in the form of permanent respiratory tract deformity as well as voice loss suffered by Mrs. Sunita can solely and directly be attributed to this single or specific negligent act.

34. Before proceeding further, let us understand what this Court has found to constitute medical negligence. In *Jacob Mathew vs. State of Punjab*[1]*,* the Court held:

> *"48. (1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations*

1 *(2005) 6 SCC 1*

which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Sing), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach', and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor additional considerations apply. A case of occupational negligence is different from the one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of the knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional maybe held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or he did not exercise, with reasonable competence in the given case, the skill which he did possess. The

standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence."

35. Following *Jacob Mathew,* the Court in *Kusum Sharma vs. Batra Hospital*[2] laid down the following principles that are to be considered while determining the charge of medical negligence:

"I.) Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. ...

III.) .... The Medical Professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV.) A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V). In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of another professional doctor.

VI.) The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure.

2 (2010) 3 SCC 480

Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII). Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

IX.) It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension. ....”

36. As can be culled out from above, the three essential ingredients in determining an act of medical negligence are: (1.) a duty of care extended to the complainant, (2.) breach of that duty of care, and (3.) resulting damage, injury or harm caused to the complainant attributable to the said breach of duty. However, a medical practitioner will be held liable for negligence only in circumstances when their conduct falls below the standards of a reasonably competent practitioner.

37. Due to the unique circumstances and complications that arise in different individual cases, coupled with the constant advancement in the medical field and its practices, it is natural that there shall always be different opinions, including contesting views regarding the chosen line of treatment, or the course of action to be undertaken. In such circumstances, just because a doctor opts for a particular line of treatment but does not achieve the desired result, they cannot be held liable for negligence, provided that the said course of action undertaken was recognized as sound and relevant medical practice. This may include a procedure entailing a higher risk element as well, which was opted for after due consideration and deliberation by the doctor. Therefore, a line of treatment undertaken should not be of a discarded or obsolete category in any circumstance.

38. To hold a medical practitioner liable for negligence, a higher threshold limit must be met. This is to ensure that these doctors are focused on deciding the best course of treatment as per their assessment rather than

being concerned about possible persecution or harassment that they may be subjected to in high-risk medical situations. Therefore, to safeguard these medical practitioners and to ensure that they are able to freely discharge their medical duty, a higher proof of burden must be fulfilled by the complainant. The complainant should be able to prove a breach of duty and the subsequent injury being attributable to the aforesaid breach as well, in order to hold a doctor liable for medical negligence. On the other hand, doctors need to establish that they had followed reasonable standards of medical practice.

39. While determining whether the *'NI'* procedure performed on Mrs. Sunita at Suretech Hospital on 13.05.2004,replacing the existing *'TT'* after the *bronchoscopy* report did not reveal any abnormalities, amounts to negligence or not, the following aspects are worthy of consideration:

a.) Whether there was a breach of duty of care, with respect to the *'NI'* procedure performed on 13.05.2004. In case a breach did occur, specific breach of responsibility of the concerned person shall have to be established; and

b.) Whether the subsequent medical complications, including permanent deformity in the respiratory tract and voice loss suffered by the patient can be directly attributed to the said breach in duty of care.

40. Though the impugned judgment held that the *'NI'* procedure undertaken amounted to negligence, it failed to point towards the specific breach of responsibility. There is nothing in the judgment to indicate who performed the said procedure. In the complaint, Mrs. Sunita has alleged that Dr. Jaiswal and Dr. Shendre performed the said procedure. However, the rebuttal from Dr. Nirmal, Dr. Madhusudan Shendre, Dr. M.A Biviji, and Suretech Hospital points towards the *bronchoscopy* and the said procedure being undertaken by Dr. Rajesh Swarnakar (serving as Pulmonologist & Bronchoscopist) on 13.05.2004. Conspicuously, there is no mention at all of the *'NI'* procedure in the discharge summary dated 27.05.2004 either. However, the medical bill dated 26.05.2004 clearly mentions both procedures to have been undertaken by Dr. Rajesh Swarnakar. Therefore, any duty of care that existed towards the patient with respect to the *bronchoscopy* and the *'NI'* procedure conducted on 13.05.2004 could only be attributed to Dr. Rajesh Swarnakar.

41. To understand whether the *'NI'* procedure amounted to a breach of duty or not, there is a need to further analyse whether the aforesaid procedure was merely an alternative choice of treatment, a necessary arrangement, or a treatment likely to have resulted in failure based on a poor medical decision made by the medical team at the Suretech Hospital. The only reason why the impugned judgment held that the saidprocedure conducted on Mrs. Sunita amounted to negligence was that it was performed out of the ordinarily expected course of action without any justification. The NCDRC reasoned that there was no justification to opt for the said procedure as the patient was able to breathe normally through the *'TT'* with the *bronchoscopy* report dated 13.05.2004 indicating normalcy in airways, trachea and larynx as well. Moreover, the said *'NI'* procedure was a short-term procedure undertaken to assist in respiration whereas the *'TT'* was resorted to with the objective of providing a longer assisted-respiration. Therefore, it was opined that replacing the existing *'TT'* with *'NI'* made little sense,particularly when Mrs. Sunita was able to breathe normally through the *'TT'*. Moreover, the *'NI'* procedure was conducted, despite various failed attempts at *'TT'* decannulation. Therefore, the act of performing the said *'NI'* procedure replacing the existing *'TT'* through which Mrs. Sunita was able to breathe normally amounted to undertaking a course of action other than what would have been expected to take place ordinarily, in such a situation. At the same time, NCDRC also noted that the expert medical committee formed by RML Hospital was silent on the *'NI'* issue. The expert committee only stated that the *bronchoscopy* report on 13.05.2004 indicated normalcy in Mrs. Sunita's airways, and that she was able to breath with a minimal stridor after *'TT'* removal.

42. The NCDRC carefully observed that Mrs. Sunita was responding well to her treatment until the removal of the existing *'TT'* or until the *'NI'* procedure was conducted. However, it failed to appreciate the medical projections that there was a need to remove *'TT'* precisely because Mrs. Sunita had been responding well to the treatment. In order to enable the patient's return towards normalcy i.e., to breathe without assistance, the removal of *'TT'* was necessitated. In fact, there was a potential risk of infection and development of complications like *stenosis* from long-term *'TT'* intubation as well. The immediate medical crisis from the vehicular accident whereafter she was admitted to Suretech Hospital in a semi-

comatose state was resolved with steady recovery. On 08.05.2004, the patient was weaned off ventilator support. Three days later, a *Mandibular Bracing Surgery* was undertaken successfully fixing her lower jaw as well. Therefore, Dr. Madhusudhan submitted that *'TT'* decannulation was undertaken only after due care and consideration was given to the decision.

43. On 11.05.2004, decannulation failed. Subsequently, on 13.05.2004 when decannulation was achieved, the desired results were not attained. Even though it was expected that Mrs. Sunita would be able to breathe normally after decannulation, a *stridor* i.e., a high-pitched respiratory noise which indicates abnormal airflow was discovered. The NCDRC failed to appreciate that a reexamination conducted upon observing breathing difficulty faced by Mrs. Sunita revealed trauma in her tracheal wall. It was due to this trauma that the anterior flap of the tracheal wall was getting sucked during inspiration thereby obstructing tracheal lumen. The said trauma was potentially attributable to the severe injuries sustained by Mrs. Sunita in the road accident and/or during the emergency *'TT'* procedure conducted at Gondia hospital on 05.05.2004. Dr. Madhusudhan indicated the need to conduct *tracheoplasty* which could not be conducted immediately. Of the available treatment options to treat the *stridor*, doctors could either opt for a long-term *'TT'* with inner cannula or the placement of an airway stent for *tracheomalacia/stenting*. Opting for an *'NI'* stent provided the advantage of the stent being able to hold the anterior flap of the trachea as well as to provide support to weakened trachea walls, thereby preventing lumen collapse, while at the same time provide breathing assistance. In such a situation, the *'NI'* procedure was chosen as a temporary stent.

44. After the difficulties faced during the *'TT'* decannulation process and the discovery of a *stridor*, opting for the *'NI'* procedure as an alternative course of treatment to aid respiration could be medically justified as well. The expert medical report by RML hospital stated that tracheal trauma, fractures and injuries in the laryngeal framework, leading to subsequent medical complications such as *subglottic stenosis* were common after severe injuries sustained in a serious road accident. After difficulties arising out of *'TT'* decannulation, reinserting the *'TT'* might have resulted in the similar or worse difficulties as well. Therefore, resorting to the *'NI'* procedure as an alternative method to provide breathing assistance did not appear to be

out of place either. As an accepted medical course of action, it was expected that the procedure would aid with recovery and lead to the desired results which did not happen. However, that cannot be said to be a breach of duty amounting to negligence either. As was rightly observed in the *Jacob Mathew caseand Kusum Sharma* case, adopting an alternative medical course of action would not amount to medical negligence.

45. As reasoned earlier, the burden of establishing negligence is on the complainant. In this case, however, Mrs. Sunita had failed to prove medical negligence by the doctors. There is no evidence to establish that the *'NI'* procedure is a bad medical practice or based on unsound medical advice. None of the hospitals where Mrs. Sunita was treated prior to Suretech Hospital opined that the *'NI'* procedure was not medically acceptable. Additionally, none of the doctors who treated her subsequently opined that the *'NI'* treatment was not a medically acceptable practice or that the said procedure had been performed negligently. On the other hand, the medical team at Suretech Hospital was able to successfully prove that due medical consideration was given before choosing the aforesaid *'NI'* procedure. Therefore, no negligence was committed in opting for and/or conducting the aforesaid procedure.

46. Moreover, there was no breach of duty of care. In view of such conclusion, it is not necessary to look at a possible causal link between the subsequent medical complications and voice-loss as well as the permanent respiratory tract deformity. However, for the sake of completion, this aspect is also being examined. The RML hospital's expert medical committee report noted that after sustaining severe injuries in a serious road accident, subsequent trauma in trachea and fractures in laryngeal framework are commonly found in patients. Severe medical complications like infections and *subglottic stenosis* are not unusual in such trauma cases either. Medical studies placed on record have shown that injuries in the trachea as well as damage to the larynx is common after prolonged *'TT'* intubation or *'NI'* procedure. Infections or *subglottic-stenosis* complications can also be caused if due care is not taken while choosing an appropriate size for the tubes. There is also a higher risk if such *'TT'* and *'NI'* procedures are done repeatedly or are done in emergency situations.

47. The patient as can be seen, received treatment in multiple hospitals, and the *'TT'* was reinserted several times. On 27.05.2004, Dr. Pradhan reinserted *'TT'* at the Prince Aly Khan Hospital, Mumbai. Another *bronchoscopy* was conducted on 03.06.2004 by Dr. Swarnakar, which revealed two openings in Mrs. Sunita's trachea at the *sub-glottic* level in addition to a false passage. Further, the patient was also under home care for a month from 04.06.2004 to 03.07.2004. She also travelled between Nagpur and Mumbai during her treatment. Thereafter, the patient with a *'TT'* in trauma care stayed at home for another period of six months from 08.07.2004 to 30.01.2005 until Dr. A. G. Pusalkar performed the *tracheoplasty.* Finally, the *'TT'* was removed on 14.03.2005. So, considering the multiple procedures, prolonged intubation, severe injuries, and subsequent medical complications, it would be unsound to link or attribute the complications solely to the *'NI'* procedure conducted on 13.05.2004.

48. Further, details are missing with respect to the date or time-frame within which the *'NI'* was removed. In the complaint filed before NCDRC by Mrs. Sunita, it was mentioned that the *'NI'* was removed on 20.05.2004 based on Dr. Kalidas Parshuramkar' claim. Since we are aware that Dr. Pradhan re-inserted *'TT'* on 27.05.2004, it can be concluded that the maximum possible duration during which *'NI'* could have lasted was two weeks i.e., from 13.05.2004 to 27.05.2004. Despite the removal of *'NI'* and reinsertion of *'TT'*, the treatment continued till 14.03.2005 i.e., the date on which *'TT'* was removed for the last time. Subsequent medical complications could have occurred or magnified at any point during the long course of treatment at multiple hospitals and by various doctors. Therefore, a causal link has not been established between the *'NI'* procedure (dated 13.05.2004) and the subsequent medical complications such as voice-loss and permanent respiratory tract deformity.

49. As the main charge of negligence regarding the aforesaid *'NI'* procedure is found to be unsubstantiated, the issue of not impleading Dr. Rajesh Swarnakar in the context becomes irrelevant. However, the plea raised by the doctors and Suretech Hospital seeking rejection of Mrs. Sunita's Consumer Case No. 48/2005 on account of non-impleadment of necessary parties is not acceptable. When the consumer case was filed, a charge of negligence against Dr. M.A Biviji was leveled in relation to the *'Barium*

Swallow Test'. Moreover, there was also a negligence charge with respect to Dr. Nirmal Jaiswal, Dr. Madhusudan Shendre, and Dr. M.A Biviji regarding *'Severe Thrombocytopenia'* and '*Severe Septicemia'*. Additionally, there was an allegation of negligence against Dr. Nirmal Jaiswal and Dr. Madhusudan Shendre for unjustifiably and forcefully performing *'NI'* procedure on Mrs. Sunita which resulted in the subsequent medical complications. All the aforementioned charges are factual in nature. A necessary party cannot always be identified at the threshold without looking at the evidence. On this aspect, the Court in *Savita Garg v. Director, National Heart Institute*[3]held that in case of an allegation of negligent treatment at a hospital, the burden to establish the absence of such negligence lies on the hospital itself. The hospital can discharge such burden by producing the concerned doctor to establish that due care was taken. Needless to say, hospitals must account for the services discharged by doctors engaged by them.

CONCLUSION

50. Taking into consideration the medical literature on record as well as the expert medical committee report presented by the RML Hospital, it is reasonable to conclude that *subglottic stenosis* & subsequent trauma in the trachea is not an uncommon phenomenon with respect to a patient that has suffered serious injuries in a road accident. In addition, there tends to be a higher risk element of developing an injury if intubation is done in an emergency situation or multiple times. It could also be a result of being subjected to intubation for a prolonged period.

51. In this particular case, the patient was treated and underwent different procedures at multiple hospitals. She underwent the *'TT'* procedure at Gondia Hospital in an emergency situation. Subsequently, she was attended to by multiple medical experts at Suretech Hospital. Therefore, there is a possibility that these medical complications could have arisen at any of these hospitals or places where the patient underwent treatment.

52. It must be pointed out that the only medical report available in this case i.e., the RML Hospital Committee Report did not attribute any negligence to Suretech Hospital, Dr. Biviji, Dr. Jaiswal or Dr. Shendre with

3 (2004) 8 SCC 56

respect to any of the charges levelled against them. If the *'NI'* procedure had been conducted in a negligent manner or was a poor medical decision, it is likely that the RML Hospital Committee Report would have mentioned the same. However, no such observation was made either. Further, none of the doctors that treated the patient commented adversely with respect to the chosen course of treatment. Therefore, there is no substance to establish the causal link between the *'NI'* procedure that was undertaken at Suretech Hospital and the subsequent medical complications that arose.

53. On the other hand, the medical team at Suretech Hospital has been able to show that the *'NI'* procedure was carried out on 13.05.2004 only after due consideration. The existing *'TT'* was removed after the bronchoscopy showed normalcy in the airways & trachea of the patient. It was expected that the patient would be able to breathe normally without any support after *'TT'* decannulation. However, a *stridor* was observed in the airways of the patient, after the said decannulation took place. In light of the same, an alternative course of treatment in the form of an *'NI'* procedure was opted for as a temporary measure. There is nothing to show that the procedure conducted was outdated or poor medical practice.

54. At this stage, we may benefit by adverting to what the renowned author and surgeon Dr. Atul Gawande had to say on medical treatment. He said *"We look for medicine to be an orderly field of knowledge and procedure. But it is not. It is an imperfect science, an enterprise of constantly changing knowledge, uncertain information, fallible individuals, and at the same time lives on the line. There is science in what we do, yes, but also habit, intuition, and sometimes plain old guessing. The gap between what we know and what we aim for persists. And this gap complicates everything we do."*

55. The above observation by Dr. Atul Gawande aptly describes the situation here. This is a classic case of human fallibility where the doctors tried to do the best for the patient as per their expertise and emerging situations. However, the desired results could not be achieved. Looking at the line of treatment in the present matter, it cannot be said with certainty that it was a case of medical negligence.

56**.** Resultantly, we hold that there was no breach of duty of care at Suretech Hospital or on part of Dr. Biviji, Dr. Jaiswal and/or Dr. Shendre. The charge of negligence is, therefore, not proved. Hence, the impugned

judgment awarding Rs. 6,11,638/- as compensation @ 9% simple interest p.a. on account of medical negligence committed by the single act of performing the aforesaid *'NI'* procedure, is found to be erroneous and is set aside.

57. Resultantly, the appeal filed by Dr. M.A Biviji (Civil Appeal No. 3975 of 2018) as well as the appeal filed by Dr. Nirmal Jaiswal, Dr. Madhusudan Shendre and Suretech Hospital (Civil Appeal arising out of Diary No. 21513 of 2018) are allowed to the extent that the charges attributing medical negligence to Suretech Hospital, Dr. Biviji, Dr. Jaiswal, and Dr. Shendre are found not proved. The appeal filed by Mrs. Sunita (Civil Appeal No. 4847 of 2018) is accordingly dismissed. Parties to bear their own cost.

Headnotes prepared by:
Ankit Gyan

Appeals disposed of.