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**Datasheet for the decision
of 10 November 2021**

Case Number: T 0341/17 - 3.2.02

Application Number: 09770662.6

Publication Number: 2279017

IPC: A61M1/00, A61F13/00

Language of the proceedings: EN

Title of invention:
ANISOTROPIC DRAPES AND SYSTEMS

Patent Proprietor:
KCI Licensing, Inc.

Opponent:
Smith and Nephew, Inc.

Headword:

Relevant legal provisions:

EPC Art. 54
RPBA Art. 12(4)

Keyword:

Novelty

Late-filed evidence - submitted with the statement of grounds of appeal - admitted (no) - should have been submitted in first-instance proceedings (yes)

Decisions cited:

T 0340/12, T 0724/08

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0341/17 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 10 November 2021

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 December 2016 concerning maintenance of the
European Patent No. 2279017 in amended form.**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: A. Martinez Möller
Y. Podbielski

Summary of Facts and Submissions

- I. The patent proprietor and the opponent lodged an appeal against the interlocutory decision of the Opposition Division concerning maintenance of the European Patent No. 2279017 in amended form according to auxiliary request 1 then on file.
- II. Oral proceedings by videoconference took place on 10 November 2021.
- III. The appellant / opponent (from now on "the opponent") requested that the decision under appeal be set aside and the patent be revoked.

The appellant / patent proprietor (from now on "the proprietor") requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or one of auxiliary requests 1 and 2, all filed with the statement setting out the grounds of appeal, whereby auxiliary request 2 corresponded to the request held allowable by the opposition division. They also requested that documents VP20 and VP21 filed with the opponent's statement of grounds of appeal not be admitted into the proceedings.

- IV. The following documents are relevant for the present decision:

VP05: US 2003/0139697 A1

VP19: US 2005/0222544 A1

VP20: US 4,224,945

VP21: WO 03/070135 A2

V. Independent device claims 1 and 8 of the main request read as follows:

1. "A wound drape (116, 216, 316, 416, 516) comprising: a flexible sheet (123, 423) for placing over a tissue site, the flexible sheet including: a first isotropic zone (124, 224, 324), characterized in that the wound drape further comprises a second isotropic zone (126, 226, 326), and wherein the first isotropic zone and the second isotropic zone are configured to provide the flexible sheet with anisotropic stretching properties and wherein the first isotropic zone (124, 224, 324) has a first thickness (t_1) of drape material and the second isotropic zone (126, 226, 326) has a second thickness (t_2) of drape material and wherein the first thickness is greater than the second thickness ($t_1 > t_2$)."

8. "A wound drape (116, 216, 316, 416, 516) comprising: a flexible sheet (123, 423) for placing over a tissue site, the flexible sheet including: a first isotropic zone (124, 224, 324), characterized in that the wound drape further comprises a second isotropic zone (126, 226, 326), and wherein the first isotropic zone and the second isotropic zone are configured to provide the flexible sheet with anisotropic stretching properties, wherein the first isotropic zone (124, 224, 324) comprises a fluidly inflatable bladder."

VI. As compared to claim 1 of the main request, in claim 1 of the first auxiliary request, after the wording "with anisotropic stretching properties", the word "and" has been replaced by the following wording:

"whereby the flexible sheet stretches more in the direction of a first (x) axis than in the direction of a second (y) orthogonal axis under equal force in the direction of each axis,"

VII. Claim 1 is the only independent claim of the second auxiliary request and is identical to independent claim 8 of the main request as recited above.

VIII. The arguments by the opponent, as far as they are relevant for the decision, may be summarised as follows:

The subject-matter of claim 1 of the main request was not novel in view of VP05. VP05 disclosed a flexible sheet consisting of backing layer 12 together with reinforcing elements 13. The first isotropic zone was defined by the parts of the flexible sheet comprising the reinforcing elements and the second isotropic zone was defined by the parts of the flexible sheet between the reinforcing elements. Regarding the thickness "of drape material", claim 1 did not specify that the same drape material was required. The thickness of drape material of the first isotropic zone thus resulted from backing layer 12 and reinforcing elements 13.

The subject-matter of claim 1 of the second auxiliary request was not novel in view of VP19. The flexible overlay of VP19 defined a flexible sheet within the meaning of claim 1. Moreover, the channels 29c in Fig. 1D and [0035] were inflatable; the presence of perforations did not prevent the channels from anticipating a "fluidly inflatable bladder".

Documents VP20 and VP21 should be admitted into the proceedings because they were prima facie relevant for

the question of novelty of claim 1 of the second auxiliary request (cf. T 340/12) and because they had been filed at the first opportunity following the Opposition Division's surprising conclusion that the channels 29c in VP19 did not anticipate the feature "a fluidly inflatable bladder".

IX. The arguments by the proprietor, as far as they are relevant for the decision, may be summarised as follows:

VP05 did not anticipate the feature "wherein the first isotropic zone (124, 224, 324) has a first thickness (t_1) of drape material and the second isotropic zone (126, 226, 326) has a second thickness (t_2) of drape material and wherein the first thickness is greater than the second thickness ($t_1 > t_2$)". The backing layer 12 of VP05 defined a flexible sheet which did not comprise the reinforcing members 13. Hence, the reinforcing members 13 did not belong to the first isotropic zone included in the flexible sheet and did not contribute to its thickness. Moreover, even if the reinforcing members 13 would be regarded as part of the first isotropic zone, they were not "of drape material", so that the first thickness of drape material in VP05 was not greater than the second thickness of drape material.

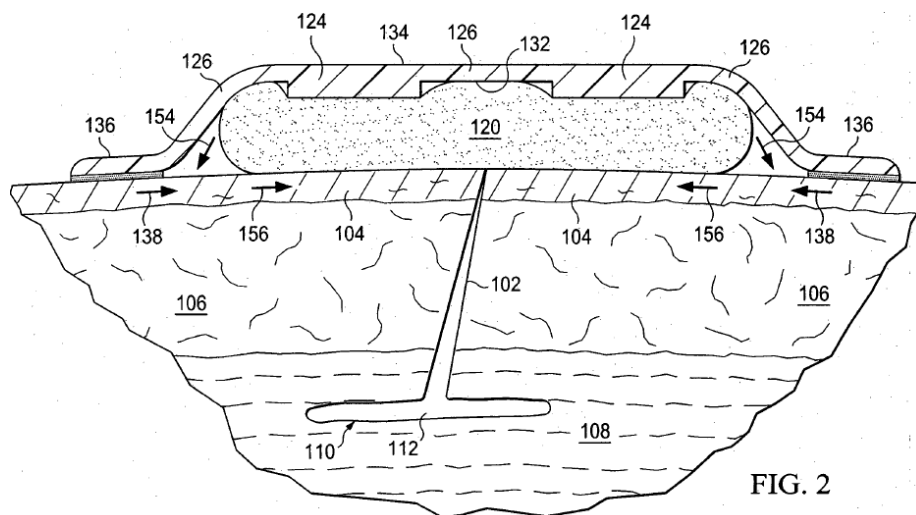
The subject-matter of claim 1 of the second auxiliary request was novel over VP19 because VP19 neither disclosed a flexible sheet nor a fluidly inflatable bladder: the overlay of VP19 was not a sheet because it was neither flat nor planar and the channels 29c were not disclosed to be inflatable.

Documents VP20 and VP21 should not be admitted into the proceedings. Claim 1 of the second auxiliary request corresponded to claim 10 as granted, so that the documents could and should have been filed during the opposition proceedings.

Reasons for the Decision

1. The invention

The invention deals with a wound drape comprising a flexible sheet. The wound drape includes first and second isotropic zones configured to provide the flexible sheet with anisotropic stretching properties. An example of a wound drape according to the invention is shown in Figure 2 of the patent specification, reproduced hereafter, wherein reference signs 124 and 126 indicate the first and second isotropic zones.



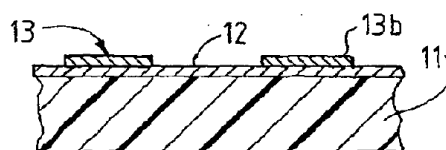
The anisotropic stretching properties allow regulating translation or approximation of tissue at different rates for different directions. This may avoid undesirable side-effects which may happen in wound care

when using a drape with a uniform elasticity in all directions.

2. Main request - novelty in view of VP05

2.1 VP05 discloses in its embodiment of Figure 5 reproduced thereafter a wound closure dressing including inter alia a backing layer 12 and reinforcing members 13 in the form of spaced parallel strips 13b. The reinforcing members 13 are made of a flexible but non-stretchable material (see paragraph [0021]). The reinforcing members 13 prevent stretching in directions parallel to them while allowing stretching in all other directions (see paragraph [0028]), thereby providing anisotropic stretching properties.

FIG. 5



2.2 The reinforcing members 13 are secured to the surface of the backing layer 12 (paragraph [0027], last sentence). Both together define, contrary to the proprietor's submission, a "flexible sheet" within the meaning of claim 1. The wording of claim 1 does not impose any restriction on the flexible sheet which would exclude a flexible sheet being composed of two elements secured to each other such as the one disclosed in VP05.

2.3 In VP05 the backing layer 12 and the reinforcing elements 13 in those parts having reinforcing members 13 define a "first isotropic zone" within the meaning of claim 1, this zone being included in the flexible sheet. The backing layer 12 in those parts not having

reinforcing members 13 on its top defines a "second isotropic zone".

- 2.4 As regards the feature "the first thickness (t_1) of drape material", the Opposition Division concluded in point 3.4.2 of the decision under appeal that the reinforcing members 13 could not be considered as being made "of drape material" because they were made of a material different than the material of the backing layer 12. This seems to be based on a narrow construction of "of drape material" as meaning "of a *single* drape material". However, the wording of claim 1 neither imposes nor implies this additional restriction.

The reinforcing members 13 are part of the wound drape. They thus contribute to the first thickness "of drape material" within the meaning of claim 1.

- 2.5 The first isotropic zone in VP05 has thus a first thickness of drape material (thickness of backing layer 12 + reinforcing members 13) that is greater than the thickness of drape material of the second isotropic zone (thickness of backing layer 12).
- 2.6 The Board thus concludes that VP05 likewise anticipates the feature "wherein the first isotropic zone (124, 224, 324) has a first thickness (t_1) of drape material and the second isotropic zone (126, 226, 326) has a second thickness (t_2) of drape material and wherein the first thickness is greater than the second thickness ($t_1 > t_2$)".

It follows that the subject-matter of claim 1 is not novel in view of VP05.

3. First auxiliary request

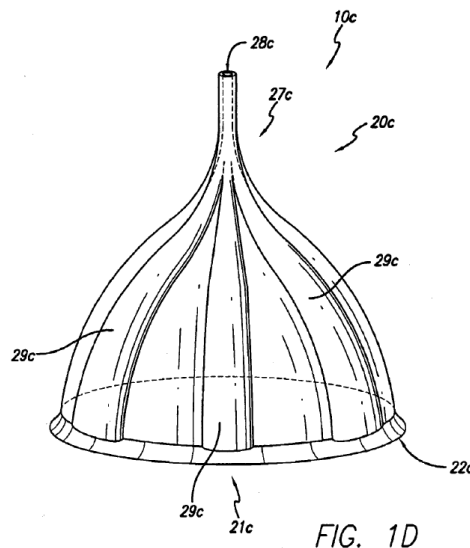
Claim 1 of the first auxiliary request comprises the additional feature "whereby the flexible sheet stretches more in the direction of a first (x) axis than in the direction of a second (y) orthogonal axis under equal force in the direction of each axis".

It is uncontested that this additional feature is anticipated by VP05 in paragraph [0028]. It follows that the subject-matter of claim 1 of the first auxiliary request is likewise not novel in view of VP05.

4. Second auxiliary request

4.1 Novelty over VP19

VP19 relates to a wound treatment appliance for reduced pressure treatment and discloses in its embodiment of Fig. 1D reproduced below a flexible overlay 20c with channels 29c (see also paragraph [0035]).



For the reasons explained below, the Board concludes that the "flexible sheet" of claim 1 is not anticipated

by the flexible overlay 20c and that the feature "a fluidly inflatable bladder" is not anticipated by the channels 29c.

- 4.1.1 The flexible overlay 20c of VP19 has a three-dimensional shape somewhat close to a conical shape. Also the other overlays in the embodiments of Figs. 1A-1C (see also paragraphs [0032]-[0034]) have a cone-like three-dimensional structure.

Upon application of reduced pressure under the flexible overlay, it collapses in the approximate direction of the wound (see paragraphs [0014], [0044] and claim 1). This may result in a substantially flat shape as shown in Fig. 2A. Once the reduced pressure stops, the flexible overlay recovers its natural cone-like shape (see paragraph [0014], penultimate sentence).

The opponent argued that a sheet within the meaning of claim 1 was an element that could cover the wound and that was comparatively flat as compared to its extension, so that the flexible overlay of VP19 would anticipate a sheet. The opponent further argued, by exemplarily referring to a sheet for covering a grill, that some structural integrity did not prevent an overlay from defining a sheet.

The Board is not convinced by these arguments. The overlay disclosed in VP19 is a shaped overlay which is neither substantially flat nor of planar nature and which is furthermore unable to maintain a shape which is substantially flat or of planar nature without the continuous application of external forces. For the person skilled in the art of wound drapes an element without any of these properties cannot qualify as a "sheet" within the meaning of claim 1.

This is in line with the discussion in paragraph [0004] of VP19 of the drawbacks associated to known wound covers using a "flexible sheet". The invention in VP19, which is said in paragraphs [0005] and [0006] to address these drawbacks, is presented as including a "flexible overlay". The term "flexible sheet" used for known wound covers in paragraph [0004] is not employed anymore when referring to the invention in VP19. Thus, VP19 further confirms that in the field of wound drapes the term "flexible sheet" is not used to refer to a flexible overlay such as the one of the invention of VP19.

Hence, the flexible overlay of VP19 does not anticipate the feature "a flexible sheet".

- 4.1.2 As regards the feature "a fluidly inflatable bladder", the opponent submitted that it was anticipated by the channels 29c in Fig. 1D.

Paragraph [0035] of VP19 discloses that these channels may "provide a conduit for reduced pressure to reach the various portions of the wound to be treated". The same paragraph further discloses that the channels may be in the form of tubes having "one or more perforations so that the channels 29c are in fluid communication with the volume under the flexible overlay 20c".

The opponent argued that some structures with perforations can still be inflated, referring exemplarily to an airbag or to a skydancer. While it is correct that the presence of perforations in the channels does not necessarily prevent the channels from being inflatable, it is not possible to conclude based

on the disclosure of VP19 that the channels 29c are inflatable. VP19 does neither indicate that an inflation is foreseen nor that it is possible. Hence, VP19 does not directly and unambiguously disclose a "fluidly inflatable bladder" as defined in claim 1.

4.1.3 It follows that the subject-matter of claim 1 is novel over VP19.

4.2 Documents VP20 and VP21

4.2.1 Documents VP20 and VP21 were filed together with the opponent's statement of grounds of appeal. They were argued to be relevant to the question of novelty of claim 1 of the request found to meet the requirements of the EPC in the appealed decision (i.e. the present second auxiliary request). Their admission is thus subject to Article 12(4) RPBA 2007, pursuant to the transitional provisions set out in Art. 25(2) RPBA 2020.

4.2.2 As brought forward by the opponent, the present second auxiliary request was filed during the oral proceedings before the Opposition Division. Its independent claim 1 corresponds to dependent claim 10 as granted. The same claim had been filed as an additional independent claim in the main request filed with the proprietor's observations on the opposition on 29 December 2014 and remained as an independent claim in all requests subsequently submitted by the proprietor.

If documents VP20 and VP21 were indeed relevant to the question of novelty of claim 1 of the second auxiliary request, they would have been likewise relevant to the question of novelty of claim 1 as granted. Furthermore, they would have also been relevant to the novelty of

the additional independent claim in all requests filed by the proprietor during the opposition proceedings. It follows that VP20 and VP21 could and should have been filed together with the notice of opposition or, at the latest, together with VP19 in the submission prior to the oral proceedings before the Opposition Division.

- 4.2.3 The opponent argued that the filing of VP20 and VP21 was a fair reaction to the Opposition Division's surprising conclusion that VP19 did not disclose a certain feature. The Board is not convinced by this argument. VP19 was itself late filed, yet admitted during the oral proceedings before the Opposition Division. The opponent could not rely on the Opposition Division reaching the conclusion advocated by the opponent. Moreover, VP20 and VP21 do not support why VP19 discloses the disputed feature but they are instead filed as evidence for new novelty objections.
- 4.2.4 The opponent further referred to T 340/12, where the prima facie high relevance of the document was regarded as taking precedence over the procedural aspects of the late filing.

The situation in T 340/12 was different in that a late-filed document was used as the second document within an inventive step attack and, according to the deciding board, used to repeat essentially the same line of argumentation which had been raised in first instance proceedings (point 3.2 of the reasons). In the present case VP20 and VP21 are instead used for completely new novelty objections. Furthermore, while a Board may use the prima facie relevance as a criterion when deciding on whether late-filed evidence is to be admitted, it is not obliged to do so (see e.g. T 724/08, point 3.4 of the reasons).

- 4.2.5 For the reasons set out above, the Board uses its discretion pursuant to Article 12(4) RPBA 2007 not to admit documents VP20 and VP21 into the appeal proceedings.
- 4.3 There were no further objections from the opponent against the second auxiliary request, which corresponds to the request found to meet the requirements of the EPC by the Opposition Division in the appealed decision.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar:

The Chairman:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated