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**Datasheet for the decision
of 27 June 2022**

Case Number: T 0383/19 - 3.2.02

Application Number: 05803276.4

Publication Number: 1809350

IPC: A61M1/00, A61M27/00

Language of the proceedings: EN

Title of invention:

TUBE ATTACHMENT DEVICE FOR WOUND TREATMENT

Patent Proprietor:

Paul Hartmann AG

Opponent:

EIP Limited

Headword:

Relevant legal provisions:

EPC Art. 123(2), 123(3)

RPBA Art. 13(2)

Keyword:

Amendments - extension beyond the content of the application
as filed (yes) - broadening of claim (yes) - relationship
between Art. 123(2) and Art. 123(3) - inescapable trap (yes)
Late-filed auxiliary requests - admitted (no)

Decisions cited:

Catchword:



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Case Number: T 0383/19 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 27 June 2022

Respondent: Paul Hartmann AG
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Appellant: EIP Limited
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
30 November 2018 concerning maintenance of the
European Patent No. 1809350 in amended form.**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: D. Ceccarelli
N. Obrovski

Summary of Facts and Submissions

I. The patent proprietor and the opponent appealed against the Opposition Division's decision that, account being taken of the amendments made by the patent proprietor according to auxiliary request 1, the European patent and the invention to which it relates met the requirements of the EPC. Subsequently, the patent proprietor withdrew its appeal.

II. Oral proceedings took place on 27 June 2022.

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the patent be maintained on the basis of one of auxiliary requests 1, 1a, 1b, 2a, 2b, 3a, 3b, 4a, 4b, 5a, 5b, 6a and 6b filed:

- during the oral proceedings before the Board (auxiliary request 1)
- by letter dated 9 April 2019 (auxiliary requests 1a, 2a, 3a, 4a, 5a, and 6a, denominated respectively auxiliary requests 1, 2, 3, 7, 8 and 9 in that letter)
- by letter dated 26 August 2019 (auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b, denominated respectively auxiliary requests 1, 2, 3, 4, 5 and 6 in that letter)

III. Claim 1 of **auxiliary request 1** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a

substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) over the aperture (54) in an orientation so that the port (60) is substantially in register with the aperture (54) and in an orientation such that the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52)."

Claim 1 of **auxiliary request 1a** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight

seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52), such that this orientation allows the vacuum tube (16) to lie flat along the primary wound cover (14)."

Claim 1 of **auxiliary request 1b** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover

(14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and in an orientation such that the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52), such that by this orientation the vacuum tube (16) lies flat along the primary wound cover (14) instead of sticking up from it."

Claim 1 of **auxiliary request 2a** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50)

comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52),

wherein the patch has a peel-off collar (42) applied around the perimeter of the side of the patch opposing the adhesive material, the collar (42) holding the shape of the patch and providing a press area to press down upon the patch over the adhesive material to make an air tight seal with the primary wound cover."

Claim 1 of **auxiliary request 2b** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50)

comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and in an orientation such that the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52), such that by this orientation the vacuum tube (16) lies flat along the primary wound cover (14) instead of sticking up from it,

wherein the patch has a peel-off collar (42) applied around the perimeter of the side of the patch opposing the adhesive material, the collar (42) holding the shape of the patch and providing a press area to press down upon the patch over the adhesive material to make an air tight seal with the primary wound cover.

Claim 1 of **auxiliary request 3a** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the

wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52),

wherein the patch has a peel-off collar (42) applied in an annular strip around the perimeter of the side of the patch opposing the adhesive material, the collar (42) holding the shape of the patch and providing a press area to press down upon the patch over the adhesive material to make an air tight seal with the primary wound cover."

Claim 1 of **auxiliary request 3b** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover

(14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and in an orientation such that the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52), such that by this orientation the vacuum tube (16) lies flat along the primary wound cover (14) instead of sticking up from it,

wherein the patch has a peel-off collar (42) applied in an annular strip around the perimeter of the side of the patch opposing the adhesive material, the collar (42) holding the shape of the patch and providing a press area to press down upon the patch over the adhesive material to make an air tight seal with the primary wound cover."

Claim 1 of **auxiliary request 4a** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52),

further comprising the tube attachment patch (10) having fixed to it a frame (18) holding the vacuum tube (16),

further comprising the frame holding a second tube in spaced parallel relation to the vacuum tube, whereby the patch can be oriented on the wound cover such that the frame supports the tubes near an opening in the cover that is positioned between the two tubes."

Claim 1 of **auxiliary request 4b** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50)

having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and in an orientation such that the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52), such that by this orientation the vacuum tube (16) lies flat along the primary wound cover (14) instead of sticking up from it,

further comprising the tube attachment patch (10) having fixed to it a frame (18) holding the vacuum tube (16),

further comprising the frame holding a second tube in spaced parallel relation to the vacuum tube, whereby the patch can be oriented on the wound cover such that the frame supports the tubes near an opening in the cover that is positioned between the two tubes."

Claim 1 of **auxiliary request 5a** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52),

wherein the patch (10, 50) is supplied with a peel-off cover (40) adhered to and covering the side of the patch on which the adhesive material (12) is applied, wherein the patch has a peel-off collar (42) applied in an annular strip around the perimeter of the side of the opposite side of the patch as the adhesive material (12) and the peel-off cover (40), the collar (42) holding the shape of the patch and providing a press area to press down upon the patch over the adhesive

material to make an air tight seal with the primary wound cover,

further comprising the tube attachment patch (10) having fixed to it a frame (18) holding the vacuum tube (16),

wherein the frame is an enclosure that creates an effective suction chamber around the ported portion of the vacuum tube, and

the frame having a main body engaging the vacuum tube and a flexible skirt depending downward from the main body to provide a conforming air tight seal between the skirt and wound cover."

Claim 1 of **auxiliary request 5b** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material

having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and in an orientation such that the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52), such that by this orientation the vacuum tube (16) lies flat along the primary wound cover (14) instead of sticking up from it,

wherein the patch has a peel-off collar (42) applied in an annular strip around the perimeter of the side of the opposite side of the patch as the adhesive material (12), the collar (42) holding the shape of the patch and providing a press area to press down upon the patch over the adhesive material to make an air tight seal with the primary wound cover, further comprising the tube attachment patch (10) having fixed to it a frame (18) holding the vacuum tube (16),

wherein the frame is an enclosure that creates an effective suction chamber around the ported portion of the vacuum tube, and

the frame having a main body engaging the vacuum tube and a flexible skirt depending downward from the main body to provide a conforming air tight seal between the skirt and wound cover."

Claim 1 of **auxiliary request 6a** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a

substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52),

wherein the patch (10, 50) is supplied with a peel-off cover (40) adhered to and covering the side of the patch on which the adhesive material (12) is applied, wherein the patch has a peel-off collar (42) applied in an annular strip around the perimeter of the side of the opposite side of the patch as the adhesive material (12) and the peel-off cover (40), the collar (42) holding the shape of the patch and providing a press area to press down upon the patch over the adhesive material to make an air tight seal with the primary wound cover,

further comprising the tube attachment patch (10) having fixed to it a frame (18) holding the vacuum tube (16),

further comprising the frame holding a second tube in spaced parallel relation to the vacuum tube, whereby the patch can be oriented on the wound cover such that the frame supports the tubes near an opening in the cover that is positioned between the two tubes,

wherein the frame is an enclosure that creates an effective suction chamber around the ported portion of the vacuum tube, and

the frame having a main body engaging the vacuum tube and a flexible skirt depending downward from the main body to provide a conforming air tight seal between the skirt and wound cover."

Claim 1 of **auxiliary request 6b** reads as follows:

"A vacuum assisted wound dressing; comprising a primary wound cover (14) adapted to be attached in a substantially air-tight seal to skin surrounding a wound, and having an opening through the cover (14);

a tube attachment device comprising: a patch (10, 50) having an adhesive material (12) around its perimeter for attaching the patch in a substantially air-tight seal to the primary wound cover (14); and

a vacuum tube (16, 56) fixed to the patch (10, 50), the vacuum tube (16, 56) having a ported portion (22) located near the opening of the primary wound cover (14) to allow vacuum pressure to be communicated to the

wound,

the device being characterized in that the patch (50) comprises a flexible sheet (52) of flexible material having an aperture (54) therethrough, wherein a port (60) is disposed in a side wall of the vacuum tube (56), and wherein the vacuum tube (56) is attached to the flexible sheet (52) in an orientation so that the port (60) is substantially in register with the aperture (54) and in an orientation such that the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52), such that by this orientation the vacuum tube (16) lies flat along the primary wound cover (14) instead of sticking up from it,

wherein the patch has a peel-off collar (42) applied in an annular strip around the perimeter of the side of the opposite side of the patch as the adhesive material (12), the collar (42) holding the shape of the patch and providing a press area to press down upon the patch over the adhesive material to make an air tight seal with the primary wound cover,

further comprising the tube attachment patch (10) having fixed to it a frame (18) holding the vacuum tube (16),

further comprising the frame holding a second tube in spaced parallel relation to the vacuum tube, whereby the patch can be oriented on the wound cover such that the frame supports the tubes near an opening in the cover that is positioned between the two tubes,

wherein the frame is an enclosure that creates an effective suction chamber around the ported portion of

the vacuum tube, and

the frame having a main body engaging the vacuum tube and a flexible skirt depending downward from the main body to provide a conforming air tight seal between the skirt and wound cover."

- IV. The appellant's arguments relevant to the decision are summarised as follows.

Admittance of auxiliary request 1

Auxiliary request 1 had been filed during the oral proceedings before the Board in the absence of any exceptional circumstances. In accordance with Article 13(2) RPBA 2020, it should not be admitted into the appeal proceedings. The objections under Article 123(2) and (3) EPC against claim 1 of all requests, in reaction to which auxiliary request 1 had been filed, had been known to the respondent since the beginning of the appeal proceedings.

Auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a

Claim 1 of auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a recited that "the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52)".

In the application as filed, there was only basis for the tube portion over the aperture being disposed substantially parallel to the flexible sheet (paragraph [0030]). This paragraph disclosed that the portion of the tube over the aperture being substantially parallel to the sheet allowed the tube to lie essentially flat along the primary cover. However,

this was not a basis for a portion of the tube adjacent to the aperture being substantially parallel to the flexible sheet. "Over" and "adjacent to" had different meanings. Portions of tube that were over the edge of the aperture were adjacent to the aperture but were not over it.

Hence, the subject-matter of claim 1 of auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a did not comply with Article 123(2) EPC.

Auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b

Claim 1 of auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b recited that "the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52)".

However, claim 1 of the patent as granted required that "the portion of the tube (56) adjacent to the aperture (54) is disposed substantially parallel to the flexible sheet (52)".

By omitting the feature of claim 1 of the patent as granted that the portion adjacent to the aperture was parallel, the scope of protection of the patent would be extended, in contravention of Article 123(3) EPC. The amendment in claim 1 of auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b reduced the amount of the tube that had to lie substantially parallel to the flexible sheet since the tube section adjacent to but not over the aperture was no longer required to be substantially parallel to the flexible sheet. This broadened the scope of protection of the claim.

- V. The respondent's arguments relevant to the decision are summarised as follows.

Admittance of auxiliary request 1

Auxiliary request 1 had been filed in reaction to the Board's conclusions on added subject-matter on the feature of the portion of the tube adjacent to the aperture disposed substantially parallel to the flexible sheet. The amendments in auxiliary request 1 *prima facie* overcame the appellant's objections and did not affect procedural economy since they only addressed the problematic feature and did not introduce new issues for which the appellant would have had to prepare. Hence, auxiliary request 1 should be admitted into the appeal proceedings.

Auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a

Claim 1 of auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a recited that "the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52)".

The application as filed provided a basis for the claim wording in paragraph [0030] and Figure 4B. This wording merely meant that the attachment of the tube to the flexible sheet had to be such that the tube should lie essentially flat in the area of the aperture. There was no technical difference between the expressions "substantially parallel" and "essentially flat", especially in view of the qualifier "substantially", which excluded strict parallelism. Figure 4B showed areas of substantial parallelism between the tube and the flexible sheet which extended beyond the aperture. Moreover, the attachment of the tube to the flexible

sheet necessarily involved an area extending around and beyond the aperture where material of the flexible sheet contacted the tube. The expression "over the aperture" included this area, which was adjacent to the aperture.

Hence, the subject-matter of claim 1 of auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a complied with Article 123(2) EPC.

Auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b

Claim 1 of auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b recited that "the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52)".

Since the expression "over the aperture" included the area adjacent to the aperture, the feature of claim 1 of the patent as granted that "the portion of the tube (56) adjacent to the aperture (54) is disposed substantially parallel to the flexible sheet (52)" had not been broadened in claim 1 of auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b.

Hence, these auxiliary requests complied with Article 123(3) EPC.

Reasons for the Decision

1. The invention

The invention relates to a vacuum assisted wound dressing. Such a device is typically used to promote

the healing of open wounds.

A device as claimed is schematically depicted in Figures 4A and 4B, reproduced below, and comprises a primary wound cover, a tube attachment device with a patch (50) for being attached to the primary wound cover and a vacuum tube (56) with a port (60) in a side wall of the tube.

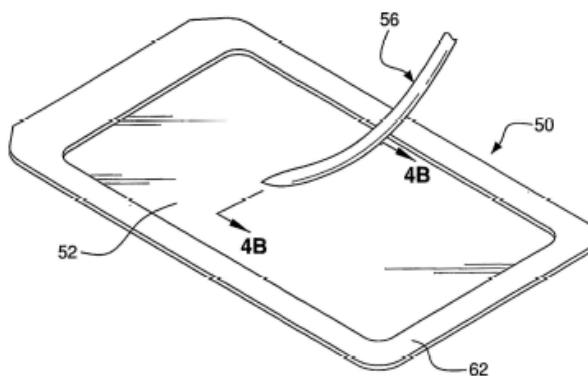


FIG. 4A

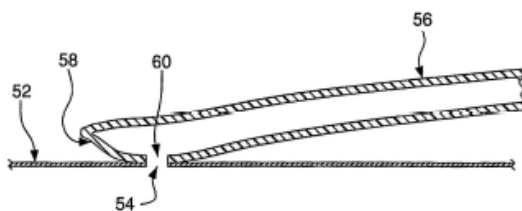


FIG. 4B

The patch comprises a flexible sheet (52) having an aperture (54), and the vacuum tube is attached to the flexible sheet in an orientation so that the port is substantially in register with the aperture.

According to claim 1 of auxiliary requests 1, 1a, 2a, 3a, 4a, 5a and 6a, the portion of the tube adjacent to and over the aperture is disposed substantially parallel to the flexible sheet. According to claim 1 of

auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b, the portion of the tube over the aperture lies substantially parallel to the flexible sheet.

According to paragraph [0026] of the patent, the orientation of the tube allows the tube to lie essentially flat along the primary wound cover, instead of sticking up from it. This may provide for a wound dressing which is more convenient to use.

2. Admittance of auxiliary request 1

Auxiliary request 1 was filed during the oral proceedings before the Board.

Under Article 13(2) RPBA 2020, any amendment to a party's appeal case made after notification of a summons to oral proceedings must, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

There were no exceptional circumstances within the meaning of this article. As the appellant pointed out, the objections under Article 123(2) and (3) EPC in reaction to which auxiliary request 1 was filed had been known to the respondent since the beginning of the appeal proceedings. The alleged *prima facie* suitability of the amendments to overcome these objections does not justify the filing of this claim request only at the oral proceedings before the Board. Contrary to the respondent's allegation, it is not in line with procedural economy to file this claim request only at the last stage in the appeal proceedings.

For these reasons, auxiliary request 1 is not admitted

into the appeal proceedings in accordance with Article 13(2) RPBA 2020.

3. Auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a

Claim 1 of auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a recites that "the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52)".

The respondent argued that the application as filed provided a basis for this claim wording in paragraph [0030] and Figure 4B.

Paragraph [0030] reads:

"[...] The tube 56 is attached to the sheet 52 over the aperture 54 in an orientation such that the portion of the tube over the aperture lies substantially parallel to the sheet and the port 60 is substantially in register with the aperture 54. This orientation allows the tube to lie essentially flat along the primary cover instead of sticking up from it [...]."

The respondent argued that the claim wording merely meant that the attachment of the tube to the flexible sheet had to be such that the tube should lie essentially flat in the area of the aperture.

However, the claim wording, in its normal meaning, goes beyond this. It requires substantial parallelism between a tube portion and the flexible sheet, not only over the aperture but also adjacent to it. The tube portion lying substantially parallel to the flexible sheet, where the aperture is located, brings about the effect that the tube can lie essentially flat along the

primary cover. Whether the claim wording does not require strict parallelism due to the term "substantially" is not decisive. Still, substantial parallelism between the tube and the flexible sheet is not the same as having the tube lie essentially flat in the area of the aperture.

Paragraph [0030] does not equate the substantial parallelism between the tube portion and the flexible sheet to the fact that the tube lies essentially flat along the primary cover either. This paragraph does not directly and unambiguously disclose that the portion of the tube adjacent to the aperture is disposed substantially parallel to the flexible sheet.

As regards Figure 4B, referred to by the respondent, tube 56 is only depicted to be parallel to flexible sheet 52 at the site where aperture 54 is located. In other locations along the primary cover, tube 56 is disposed at an angle with respect to flexible sheet 52. Still, it is disclosed that the tube may lie essentially flat along (i.e. instead of sticking up from) the primary cover, for example in contrast to configurations of the prior art in which the tube is essentially perpendicular to the primary cover.

Necessarily, as the respondent submitted, tube 56 must be parallel to the flexible sheet in the area of attachment of the tube to the flexible sheet. However, there is no reason for limiting, in a direct and unambiguous way, the portion of the tube adjacent to the aperture as in claim 1 of auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a to the area of attachment of the tube to the flexible sheet as shown in Figure 4B. For the same reasons, the portion of the tube adjacent to the aperture is not limited to or included in the

portion of the tube "over the aperture" according to the claim wording. This is irrespective of whether the portion of the tube in the area of attachment in the figure could be considered the portion "over the aperture".

It follows that the expression "the portion of the tube (56) adjacent to and over the aperture (54) is disposed substantially parallel to the flexible sheet (52)" in claim 1 of auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a extends beyond the content of the application as originally filed.

Hence, auxiliary requests 1a, 2a, 3a, 4a, 5a and 6a cannot be allowed for lack of compliance with Article 123(2) EPC.

4. Auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b

Claim 1 of auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b recites that "the portion of the tube (56) over the aperture (54) lies substantially parallel to the flexible sheet (52)".

However, claim 1 of the patent as granted required that "the portion of the tube (56) adjacent to the aperture (54) is disposed substantially parallel to the flexible sheet (52)".

As explained above, there is no reason for asserting that the portion of the tube "over the aperture" includes the portion of the tube "adjacent to the aperture".

Because of the omission of the feature of claim 1 of the patent as granted that the portion adjacent to the

aperture is disposed substantially parallel to the flexible sheet, the portion of the tube adjacent to but not over the aperture is no longer required to be substantially parallel to the flexible sheet. In other words, the amount of the tube that has to lie substantially parallel to the flexible sheet may be reduced according to claim 1 of auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b. Hence, the subject-matter of claim 1 of auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b has a broader scope of protection than the subject-matter of claim 1 of the patent as granted. This infringes Article 123(3) EPC.

Hence, auxiliary requests 1b, 2b, 3b, 4b, 5b and 6b cannot be allowed for lack of compliance with Article 123(3) EPC.

5. Since no request on file fulfils the requirements of the EPC, the patent has to be revoked in accordance with Article 101(3)(b) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



N. Schneider

M. Alvazzi Delfrate

Decision electronically authenticated