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Datasheet for the decision of 13 March 2025

Case Number: T 2489/22 - 3.2.02

Application Number: 12008236.7

Publication Number: 2596815

IPC: A61M1/00, A61M27/00

Language of the proceedings: EN

Title of invention:
Device for wound therapy

Patent Proprietor:
Smith & Nephew, Inc.

Opponents:
KCI Manufacturing Unlimited Company
Pajaro Limited

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 76(1), 104(1), 123(2)
RPBA 2020 Art. 12(4), 12(6), 13(1), 16(1)

Keyword:

Amendments - added subject-matter (no)
Novelty - (yes)
Inventive step - (yes)
Amendment to case - amendment admitted (no)
Late-filed objection - admitted (no)
Apportionment of costs - (no)

Decisions cited:

T 2490/22

Catchword:

Europäisches Patentamt
European Patent Office
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Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2489/22 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 13 March 2025

Appellant: (Patent Proprietor)	Smith & Nephew, Inc. 1450 Brooks Road, Memphis, TN 38116 (US)
Representative:	HGF HGF Limited 1 City Walk Leeds LS11 9DX (GB)
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Representative:	Simmons & Simmons City Point One Ropemaker Street London EC2Y 9SS (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 28 September 2022 concerning the maintenance of European Patent No. 2596815 in amended form**

Composition of the Board:

Chairman	M. Alvazzi Delfrate
Members:	D. Ceccarelli
	C. Schmidt

Summary of Facts and Submissions

I. The patent proprietor and opponent 2 appealed against the Opposition Division's decision that, account being taken of the amendments made by the patent proprietor during the opposition proceedings in accordance with auxiliary request 3 then on file, the patent and the invention to which it related met the requirements of the EPC.

II. The Board summoned the parties to oral proceedings and provided its preliminary opinion.

III. By letter dated 22 January 2025 the appellant/ opponent 2 ("opponent 2") announced that it would not attend the oral proceedings.

IV. The oral proceedings took place on 13 March 2025 in the absence of opponent 2, which was treated as relying only on its written case, in accordance with Rule 115(2) EPC and Article 15(3) RPBA.

The appellant/patent proprietor ("the proprietor") requested that the decision under appeal be set aside and that the patent be maintained on the basis of one of the main request and the first to fifth auxiliary requests, filed on 27 January 2023.

The respondent/opponent 1 ("opponent 1") requested that the proprietor's appeal be dismissed.

Opponent 2 had requested in writing that the decision under appeal be set aside and that the patent be revoked.

V. The following documents are mentioned in this decision:

D1: US 2005/0222544 A1
D3: DE 20 2004 017 052 U1
D4: WO 2005/123170 A1
D5: US 2004/0073151 A1
D6: DE 20 2004 018 245 U1
D7: US 4,655,754
D8: US 6,800,074 B2
D11: WO 94/20041 A1
D16: Judgment of the Federal Patent Court of Germany, 4 Ni 12/15 (EP)
D19: US 2007/0185426 A1
D21: "Dubbel - Taschenbuch für den Maschinenbau", KH Grote and J Feldhusen, Springer, 21st edition, pages F14-F15, 2005
D22: "Pahl/Beitz Konstruktionslehre - Methoden und Anwendung erfolgreicher Produktentwicklung", J Feldhusen and KH Grote, Springer, 8th edition, pages 553-561, 2013
D23: US 2008/0306456 A1

VI. **Claims 1, 10 and 11 of the main request** read as follows:

"1. A wound therapy device configured to provide negative pressure therapy to a wound, comprising:

a housing (20; 120; 220; 420; 520; 520a, 520b; 820) comprising a flexible barrier and configured to cover at least a portion of a wound;

a wound interface layer (41);

a liquid-retention chamber (40; 140; 240; 440; 540; 640, 640'; 840) positioned inside the housing;

a vacuum source;

a vacuum connection (30; 32; 130, 132; 232; 432) for coupling to the vacuum source, the vacuum connection in gaseous communication with the liquid retention chamber; and

a liquid barrier (36; 136; 236; 436; 636; 636') which prevents travel of liquid from the liquid retention chamber to the vacuum connection while allowing gas flow,

characterized in that

the liquid barrier is positioned inside the housing."

"10. The wound therapy device of any preceding claim, further comprising a seal (28, 228, 428) for sealing the wound therapy device to a body surface of a patient."

"11. The wound therapy device of Claim 10, wherein the liquid barrier is distinct from the seal."

Claims 2 to 9 and 12 to 18 are further dependent claims.

VII. The arguments by opponent 1, where relevant to this decision, can be summarised as follows.

Extension of subject-matter

There was no basis in the application as filed or in the parent application as filed for a liquid barrier inside a housing but without a vacuum chamber inside

the housing.

Paragraphs [0024] and [0028] of the application and the parent application as filed, which related to the embodiment in Figure 2, disclosed a liquid barrier inside a housing, but only in a position and with a function in which it separated a liquid-retention chamber from a vacuum chamber, also both inside the housing.

The embodiment in Figure 3 did not provide a basis for claim 1 either. Paragraph [0037] described a dressing with a liquid-retention chamber and a vacuum chamber. There was no suggestion of a device without that vacuum chamber. The vacuum chamber could act as a droplet gap and hence removed the need for a further liquid barrier; however, this disclosure was specific to a vacuum chamber acting as a droplet gap and could only provide a basis for a vacuum chamber configured as a droplet gap. Claim 1 was much broader and included any type of liquid barrier.

Paragraph [38] of the application and the parent application as filed described a further embodiment in which a hydrophobic membrane was positioned around a droplet gap structure (which was a vacuum chamber). In this embodiment the vacuum chamber was still present together with a specific form of liquid barrier. This embodiment could not provide a basis for the generality of claim 1 of the main request, either.

In conclusion, the application and the parent application as filed disclosed three discrete embodiments, which could not be generalised to exclude the vacuum chamber since such a chamber was present in all the embodiments.

The vacuum chamber was functionally and structurally linked to the position of the liquid barrier because the barrier separated the two chambers and prevented liquid flow between them, as described in paragraph [0028]. Without a vacuum chamber the liquid barrier would lie on the internal surface of the housing. This would mean that the only route for negative pressure into the liquid collection chamber would be through the small area of the liquid barrier directly underneath the port and directly into the absorbent material. Exudate and other material from the wound would be drawn to that area and would block the passage of gas, thus preventing the application of negative pressure to the wound. The vacuum chamber was required to distribute the reduced pressure across the area of the liquid barrier, thus preventing exudate from moving to one location and consequently blocking the gas flow required to deliver reduced pressure. The vacuum chamber thus worked together with the liquid barrier to ensure reduced pressure could reach the wound being treated. The features were thus interlinked and the vacuum chamber could not be omitted.

Novelty

The subject-matter of claim 1 of the main request was not novel over D1. D1 disclosed a wound therapy device configured to provide negative pressure therapy to a wound, with a housing, a wound interface layer, a liquid-retention chamber, a vacuum source, a vacuum connection and a liquid barrier according to the characterising part of the claim. Moreover, D1 disclosed that the liquid barrier was positioned inside the housing in paragraph [0064], as this paragraph disclosed a hydrophobic filter positioned within a

reduced pressure supply port that formed part of the housing.

Inventive step

If it was concluded that D1 did not disclose that the liquid barrier was inside the housing, this distinguishing feature would be trivial. The liquid barrier would perform precisely the same function whether it was positioned in an outlet of the housing in the form of a pressure supply port or just within the housing itself, for example across the mouth of the outlet. The distinguishing feature would not involve a technical difference or a technical effect, as in both positions the barrier would prevent the passage of liquid. Hence, it would have been an obvious arbitrary choice for the person skilled in the art to locate the liquid barrier inside the housing for the liquid barrier to perform its function of retaining liquid inside the collection chamber.

It was irrelevant whether or not a wound therapy device according to claim 1 of the main request would ensure that the liquid was collected exclusively within the housing, which could then safely be disposed of. This effect was also provided by D1, as the liquid barrier was in the pressure supply port, which would be disposed of together with the housing part.

The proprietor's argument that the person skilled in the art would not have been prompted to change the position of the liquid barrier in the device in D1 because, in use, the housing in D1 was intended to collapse and then the liquid barrier would be brought into contact with the wound was not convincing either. This was not necessarily the case with the wound

therapy device according to D1.

In conclusion, the subject-matter of claim 1 of the main request was not inventive when starting from D1.

VIII. The arguments by opponent 2, where relevant to this decision, can be summarised as follows.

Extension of subject-matter

The parent application as filed disclosed the feature of a housing comprising a flexible barrier only in combination with structural supports. The omission of the structural supports for allowing a vacuum to be maintained within the housing from claim 1 of the main request resulted in added subject-matter.

The description and the claims of the parent application as filed did not disclose a liquid barrier positioned inside the housing. The drawings did not provide direct and unambiguous disclosure of this feature either. Hence, because of this feature, too, claim 1 of the main request comprised added subject-matter. Moreover, a liquid barrier preventing travel of liquid while allowing gas flow from the liquid-retention chamber to the vacuum connection had only been disclosed in the context of the embodiments in Figures 1 and 2 of the parent application as filed, and in connection with a vacuum chamber, with the subdivision of the internal space of the housing into a vacuum chamber and the liquid-retention chamber separated by the liquid barrier and with the liquid barrier in the form of a porous hydrophobic film; however, the vacuum chamber, the subdivision of the internal space and the specific nature of the liquid barrier had been omitted from claim 1 of the main

request, which, for this reason too, included added subject-matter.

Claim 1 of the parent application as filed did not disclose a vacuum source belonging to the claimed wound therapy device. Moreover, paragraph [24] of the parent application as filed disclosed an adaptor allowing an external vacuum source to be attached. The definition of the vacuum source and the absence of a definition of the adaptor in claim 1 of the main request included added subject-matter.

The seal defined in claims 10 and 11 of the main request was different from the seal defined in claim 2 of the parent application as filed and found no basis in the remaining parts of the parent application as filed, either.

When checking the claims of the auxiliary requests, which were filed very late, only during the oral proceedings before the Opposition Division, it had become apparent that additional objections of added subject-matter applied to the main request.

One of these additional objections was that claim 1 of the parent application as filed specified that the vacuum connection was separated from the liquid-retention chamber by a liquid barrier. This information was missing from claim 1 of the main request, because it was not implied by this feature that the liquid barrier prevented travel of liquid while allowing gas flow from the liquid-retention chamber to the vacuum connection.

The other additional objections related to dependent claims 3 to 9 and 12 to 17. The support structure

defined in claim 3 did not find a basis in claim 6 of the parent application as filed, which defined structural supports for a specific function; moreover, paragraphs [21] and [32] of the parent application as filed specified that the structural supports were rigid or semi-rigid. Claims 4 and 5 of the main request referred to absorbent material for absorbing and retaining wound exudate; however, there was no disclosure of such a material in the parent application as filed. Claims 6 and 7 specified the position of the vacuum source, this being external or internal to the housing, which was not disclosed in conjunction with the embodiment in Figures 1 and 2 of the parent application as filed, on which the claims of the main request would have to be based. The fill indicator defined in claim 8 of the main request could not be based on the combination of claims 1 and 21 of the parent application as filed because the vacuum connection separated from the liquid-retention chamber by a liquid barrier had been omitted from claim 8, and because the fill indicator had not been disclosed in combination with the vacuum source. The definition of the pressure relief valve in claim 9 of the main request was different from its definition in claim 17 of the parent application as filed; moreover, the pressure relief valve had not been disclosed in combination with the vacuum source. The additional features of claims 12 to 17 of the main request had not been disclosed in combination with the vacuum source; moreover, paragraph [28] of the parent application as filed could not support claims 16 and 17 because the expression "porous hydrophobic film" had been omitted from these claims.

Novelty

D1 disclosed a wound therapy device comprising all the features of claim 1 of the main request. The device illustrated in Figure 6 comprised a conical housing delimiting a collection chamber and a vacuum supply port 596, in which there was a hydrophobic filter serving as a liquid barrier (claim 55 and paragraph [0064] of D1). The supply port was part of the housing since paragraph [0064] taught that the port 596 was positioned at the apex of the collection chamber. Moreover, the person skilled in the art understood that the collection chamber and the port were a single piece, since manufacturing separate elements and joining them together would have been less convenient.

D3 also disclosed a wound therapy device comprising all the features of claim 1 of the main request. Figures 1a to 1c illustrated an embodiment with a wound-covering member 4 sealing a volume 10 above a wound. An absorbing body 2 was in the volume 10, between the wound and the wound-covering member 4. The volume 10 was a liquid-retention chamber. Any hollow space between the wound-covering member and the wound suitable for containing a liquid was a liquid-retention chamber within the meaning of claim 1 of the main request. The absorbing body sucked in wound exudate and was therefore a liquid barrier as claimed. Moreover, in view of the common general knowledge as evidenced by D21 and D22, a single entity fulfilling both the functions of a liquid-retention chamber and of a liquid barrier would still anticipate the liquid-retention chamber and the liquid barrier as defined in claim 1 of the main request. The liquid-retention chamber and the liquid barrier were not limited structurally in the

claim. D21 and D22 explained that a single product could fulfil two or more functions.

D4 also disclosed a wound therapy device comprising all the features of claim 1 of the main request. The embodiment illustrated in Figure 3 comprised a housing in the form of a cover sheet 11. The space under the cover sheet 11 was a liquid-retention chamber including a sponge layer 14, a silver-impregnated charcoal cloth 15, a water absorbent layer 16 and a water-permeable, size exclusion membrane separating the layers 15 and 16 (page 20, lines 5 to 8 of D4), which very much resembled the embodiment in Figure 11 of the patent. The water-absorbent layer 16, possibly together with the water-permeable, size exclusion membrane, was a liquid barrier within the meaning of claim 1 of the main request. This was also in accordance with the findings of the German Federal Patent Court in a similar case dealt with in D16, as explained on pages 25 and 26 of D16.

D5 also disclosed a wound therapy device comprising all the features of claim 1 of the main request. The embodiment illustrated in Figure 8a comprised a housing covering all the components of the device and a liquid barrier in the form of a filter 253, arranged within the housing.

D6 also disclosed a wound therapy device comprising all the features of claim 1 of the main request. The embodiment illustrated in Figures 2b and 2c comprised a housing including a wound-covering member 3. Beneath the wound-covering member 3 there was a volume 5, which was a liquid-retention chamber in accordance with the meaning of claim 1. The wound therapy device also included an absorption body 2, which was a liquid

barrier as claimed.

D11 also disclosed a wound therapy device comprising all the features of claim 1 of the main request. The embodiment illustrated in Figure 5 comprised a housing including a liquid barrier in the form of a cup 138. Gravity and the distance between the wound and a suction port 134 achieved by the geometry of the cup would help to prevent liquid from reaching the suction port 134, while allowing gas flow.

The subject-matter of claim 1 of the main request was not novel over D19 and D23. D19 had been filed before the department of first instance because of the Opposition Division's narrow interpretation of the term "housing" in the claim and was, *prima facie*, relevant for novelty. D23 was known to the proprietor and to the Board from the opposition proceedings concerning appeal case T2490/22. Therefore, the novelty attack could be analysed without considerable effort.

Inventive step

The subject-matter of claim 1 of the main request lacked at least inventive step when starting from D1. Under the assumption that D1 did not disclose a liquid barrier positioned inside the housing, this distinguishing feature would help to improve the reliability and durability of the wound therapy device. However, as derivable from paragraph [0007], D1 by itself prompted the person skilled in the art to improve the reliability and durability of the wound therapy device. Manufacturing the collection chamber 590 and the reduced pressure supply port 596 as a single piece would avoid a costly separate mould for the reduced pressure supply port. This resulted in a

wound therapy device according to the definition of claim 1 of the main request which avoided leaks and improved the mechanical stability of the device. The device would also be more reliable and durable.

The subject-matter of claim 1 of the main request lacked at least inventive step when starting from D3, too. Under the assumption that D3 did not disclose a liquid barrier as claimed, the technical effect of this distinguishing feature would be to retain the wound exudate inside the liquid-retention chamber and to prevent it from entering the vacuum source. This solved the technical problem of protecting the vacuum source from contamination with wound exudate. Protecting vacuum sources from contamination with wound fluids was well known in the art. For example, D7 disclosed a drain reservoir that was connected to a vacuum source and was closed by a liquid barrier in the form of a filter unit against the connection. The filter unit was within the reservoir. D8 disclosed a canister that was connected to a vacuum source and was closed towards the vacuum connection by a hydrophobic filter, which served as a liquid barrier. The hydrophobic filter was within the canister. Accordingly, the person skilled in the art would have been prompted by D7 or D8 to supplement the device in D3 with a filter positioned inside the housing, thus arriving at the subject-matter of claim 1 of the main request in an obvious way.

The subject-matter of claim 1 of the main request lacked at least inventive step when starting from D11, too. Under the assumption that D11 did not disclose a liquid barrier positioned inside the housing, this distinguishing feature would help to improve the reliability and durability of the wound therapy device; however, D11 by itself prompted the person skilled in

the art to improve the reliability and durability of the wound therapy device, since it taught that leaks and negative pressure may draw pathogens into the housing, which was detrimental to healing. The person skilled in the art would have turned to D1, which disclosed a housing with a reduced pressure supply port and a filter positioned in the port. The person skilled in the art would have recognised that the filter in D1 helped to increase the reliability of the vacuum system in D11 and to reduce its maintenance. The person skilled in the art would have positioned the filter in D1 in a central suction port formed as a single piece with the cup in D11, and hence the filter would have been positioned within the housing in D11. This resulted in a wound therapy device according to the definition of claim 1 of the main request.

Proprietor's request for apportionment of costs

The proprietor's request for apportionment of costs against opponent 2 was to be refused. Filing new evidence or presenting new arguments was a legitimate way of defending an opponent's interests.

IX. The proprietor's arguments, where relevant to this decision, can be summarised as follows.

Extension of subject-matter

The embodiments in Figures 2, 3, 4, 5, 6, 7, 9a, 9b and 11 and paragraphs [24], [28], [37], [40], [45], [50] and [59] of the parent application as filed provided a basis for a liquid barrier positioned inside a housing as defined in claim 1 of the main request. According to the parent application as filed, there was no structural or functional link between the liquid

barrier and a vacuum chamber that would make it necessary for the internal space of the housing to be subdivided into two chambers. The function of the liquid barrier was to prevent travel of liquid from the liquid-retention chamber into the vacuum connection whilst allowing gas to flow as defined in claim 1 of the main request. This functional requirement was disclosed in paragraph [28] of the parent application as filed and could be met irrespective of whether or not a vacuum chamber was present within the internal space of the housing. The embodiment in Figure 3 comprised a housing including a liquid-retention chamber and a vacuum passage with a port to receive an external vacuum source. Additionally, paragraph [37] of the parent application as filed disclosed that the device included a vacuum chamber acting as a liquid barrier in the form of a droplet gap. The liquid barrier was immediately proximate to the vacuum connection and did not subdivide the housing into a liquid-retention chamber and a vacuum chamber. Hence, the embodiment in Figure 3 provided a direct and unambiguous basis for the feature of the liquid barrier positioned inside the housing as defined in claim 1 of the main request. A porous hydrophobic film as a liquid barrier was not inextricably linked to the ability of the liquid barrier to allow gas flow. Paragraph [28] of the parent application as filed discusses that "*other technologies that allow gas flow but prevent liquid flow may also be used as suitable liquid barriers*".

As regards the argument by opponent 1 that the presence of a vacuum chamber within the housing was necessary for distributing reduced pressure across a sufficiently large area of the liquid barrier, the parent application as filed did not mention or describe such an effect.

A housing comprising a flexible barrier without structural supports found a clear and unambiguous basis in claim 5 of the parent application as filed, as also recognised by the Opposition Division in the impugned decision (point 4.2 of the Reasons).

Paragraph [30] of the parent application as filed disclosed "*a vacuum source coupled to the vacuum connection*" and hence provided a direct and unambiguous basis for the vacuum source being part of the wound therapy device. As regards the alleged omission of the definition of an adaptor, claim 1 of the main request defined a vacuum connection for coupling to the vacuum source. The vacuum connection was the adaptor according to paragraph [24] of the parent application as filed.

Claims 10 and 11 were based on claim 2 and paragraphs [5] and [23] of the parent application as filed.

Opponent 2 had raised new objections of added subject-matter against claims 1, 3 to 9 and 12 to 17 of the main request. These objections constituted an amendment to the appeal case by opponent 2, which should have raised such objections during opposition proceedings, particularly in advance of the oral proceedings. It was not permissible to wait until the appeal proceedings to develop and raise new arguments. The argument that this had been in response to the proprietor having filed auxiliary requests "*very late in the proceedings*" was wrong. The dependent claims were present in the patent as granted. It was irrelevant whether or not the objections had become apparent when opponent 2 was preparing its arguments for the appeal proceedings. Moreover, the new objections were not *prima facie*

relevant.

The objection concerning the alleged omission from claim 1 of the main request of the vacuum connection being separated from the liquid-retention chamber by the liquid barrier was wrong, because the claim specified that the liquid barrier prevented travel of liquid from the liquid-retention chamber to the vacuum connection whilst allowing gas flow. This implied that the liquid barrier was between those two components (and thus separated them). Claim 3 was based on claim 6 of the parent application as filed. Claims 4 and 5 were based on paragraph [29] of the parent application as filed. Claims 6 and 7 were based on paragraph [23] of the parent application as filed, *inter alia*. Claim 8 was based on claim 21 of the parent application as filed. Claim 9 was based on claim 17 of the parent application as filed. Claims 12 to 17 were based on paragraph [28] of the parent application as filed, in which porous and microporous PTFE were specific types of porous hydrophobic films.

Novelty

The subject-matter of claim 1 of the main request was novel over the cited documents.

D1 did not disclose a liquid barrier positioned inside a housing. The reduced pressure supply port and the reduced pressure supply means of the wound therapy device in D1 were located above the region defined by the flexible overlay 520 and the collection chamber 590 in Figure 6, which made up the housing of the device. The pressure supply port was a distinct component, separate from the chamber 590.

D3 did not disclose a liquid-retention chamber together with a liquid barrier configured to prevent travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow. The entire volume 10 below the wound-covering element in Figures 1a to 1c could not be construed as a liquid-retention chamber because it was only the absorbent body 2 which retained fluid. Moreover, the liquid-retention chamber and the liquid barrier had to be distinct and separate entities because they were claimed and defined as separate entities in claim 1 of the main request. The absorbent body 2 could not be both the liquid-retention chamber and the liquid barrier as defined in claim 1 of the main request at the same time. D21 and D22 had been filed late, had not been admitted by the Opposition Division and were entirely irrelevant. They discussed dual functionalities in general and did not relate to wound therapy devices. Whether or not the person skilled in the art would have considered using one element to serve dual functionalities did not change the fact that the claim required the liquid-retention chamber and the liquid barrier to be separate and distinct entities. D21 and D22 were not to be admitted into the appeal proceedings.

D4 did not disclose a liquid-retention chamber together with a liquid barrier configured to prevent travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow. The entire space under the cover sheet 11 in Figure 3 could not be construed as a liquid-retention chamber because it was only the water-absorbent layer 16 which retained fluid. The water-absorbent layer 16 could not be both the liquid-retention chamber and the liquid barrier as defined in claim 1 of the main request at the same time. D16 had no relevance to the current proceedings

because it concerned a patent with a different claim.

D5 did not disclose a liquid barrier positioned inside a housing as defined in claim 1 of the main request. The filter 253 in Figure 8a was encased in a fluid-impermeable housing other than the wound cover 240 comprising a flexible barrier.

D6 did not disclose a liquid-retention chamber together with a liquid barrier configured to prevent travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow. The entire volume 5 under the wound-covering member 3 in Figures 2b and 2c could not be construed as a liquid-retention chamber because it was only the absorption body 2 which retained fluid. The absorption body 2 could not be both the liquid-retention chamber and the liquid barrier as defined in claim 1 of the main request at the same time.

D11 did not disclose a liquid barrier positioned inside a housing as defined in claim 1 of the main request. The cup 138 in Figure 5 had passages through which fluid could flow. Hence, it could not act as a liquid barrier.

D19 and D23 were not to be admitted into the appeal proceedings. D19 had not been admitted by the opposition division and was not *prima facie* relevant. It disclosed a wound therapy device having the same construction as D4. D23 had been filed by opponent 2 after its reply to the proprietor's statement of grounds. Whether or not it had been cited in opposition proceedings concerning another patent was not a valid reason for filing it so late in the current appeal. Moreover, D23 was not *prima facie* relevant in view of

the fact that the absorption body 5 (Figure 1) could not be both the liquid-retention chamber and the liquid barrier as defined in claim 1 of the main request at the same time.

Inventive step

The objection of lack of inventive step by opponent 1 had been raised late and was not to be admitted into the appeal proceedings.

In any case, the subject-matter of claim 1 of the main request was inventive when starting from D1. This document did not disclose a liquid barrier positioned inside the housing as claimed.

This distinguishing feature prevented travel of liquid to the vacuum connection and ensured that the collection of wound exudate was confined to regions of the device positioned below the wound cover. As a result, the device was modular in that the liquid-retention chamber or the vacuum source could be replaced as needed (paragraph [0052] of the patent) with a reduced risk of contact with potentially dangerous bodily fluids (paragraph [0054] of the patent). The claimed device was particularly convenient for smaller wounds such as those that were under home care. Accordingly, the invention defined by claim 1 of the main request addressed the problem of providing an improved disposable negative pressure wound therapy device for treating smaller wounds and those under home care.

The arrangement in D1 resulted in liquids exiting the housing of the dressing element and entering the port, where the filter 596 was located. Hence, the risk of

the user coming into contact with the bodily fluids was increased. The person skilled in the art would not have been prompted or motivated to modify D1 and to move the filter to a position that was inside the collection chamber. Furthermore, modifying the device in D1 in such a way would increase the risk that the filter would become occluded by wound exudate, since the housing in D1 was intended to collapse under the application of negative pressure (paragraph [0064] of D1) and would also limit the volumetric collection capacity of the collection chamber. The assertion by opponent 2 that the person skilled in the art would have manufactured the collection chamber 590 and the reduced pressure supply port 596 as a single piece in D1 involved a hindsight analysis. There was no teaching in D1 that the chamber and the port were to be manufactured as a unit. Even if the person skilled in the art had chosen to do so, there would still have been several options for positioning the filter.

The subject-matter of claim 1 of the main request was inventive when starting from D3, too. This document did not disclose a liquid-retention chamber together with a liquid barrier configured to prevent travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow.

This distinguishing feature reduced the risk of contact with potentially dangerous bodily fluids and addressed the problem of providing an improved disposable negative pressure wound therapy device for treating smaller wounds and those under home care.

D3 taught that the device satisfactorily retained exudate within the absorption body. There was no suggestion in D3 that the suction devices it disclosed

should be protected from contamination. The suction sources used in D3 were basic, disposable devices (such as an injection syringe illustrated in Figure 1a). The person skilled in the art would not have been prompted to incorporate a liquid barrier to prevent exudate from leaving the liquid-retention chamber. D7 and D8, referred to by opponent 2, concerned non-portable, sophisticated canister-based wound treatment systems. These were the types of systems that the device in D3 was intended to replace. It was therefore not apparent why the person skilled in the art would have considered the teaching of D7 or D8 to be of relevance to the simple, disposable apparatus used in D3.

The objection of lack of inventive step by opponent 2 starting from D11 was not to be admitted into the appeal proceedings.

In any case, the subject-matter of claim 1 of the main request was inventive when starting from D11. This document did not disclose a liquid barrier positioned inside the housing as claimed.

There was nothing to prompt the person skilled in the art to modify the cup 138 in D11 to provide a liquid barrier. In fact, this would have necessitated a substantive redesign of the whole system.

Proprietor's request for apportionment of costs

An apportionment of costs against opponent 2 in accordance with Article 16 RPBA 2020 was requested.

Opponent 2 filing a large number of new objections and further evidence at a late stage in the appeal proceedings was contrary to the need for procedural

efficiency and amounted to an abuse of procedure. It potentially prejudiced the timely and efficient conduct of the oral proceedings. Moreover, the proprietor could have not foreseen these objections being raised, which made it difficult to assess the merits and necessitated further arguments, and possibly further requests to remedy the issues raised. The proprietor had thus incurred unforeseen costs that could and should have been avoidable.

Reasons for the Decision

1. Subject-matter of the patent

The patent in suit relates to a wound therapy device configured to provide negative pressure therapy to a wound. Such a device is typically used to promote healing, especially of chronic wounds.

Two embodiments of a wound therapy device according to the patent are illustrated in Figures 2 and 3, reproduced below.

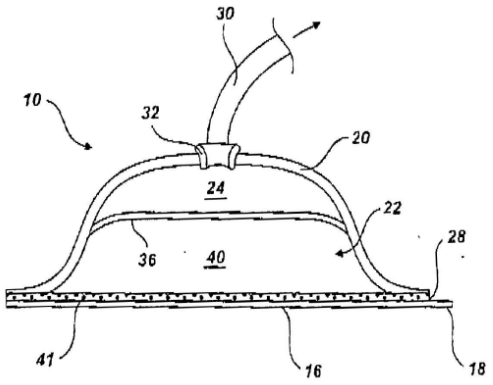


Fig. 2

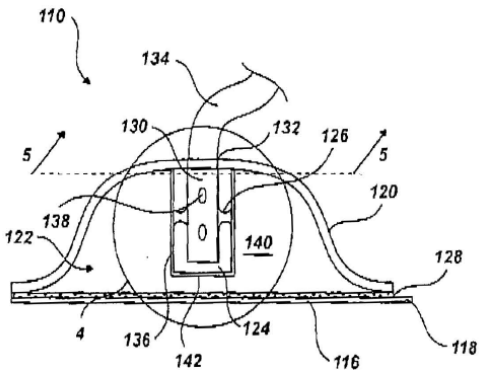


Fig. 3

The device comprises a housing (20, 120), a wound

interface layer (41), a liquid-retention chamber (40, 140), a vacuum source, a vacuum connection (30, 32, 130, 132) and a liquid barrier (36, 136).

The housing comprises a flexible barrier and is configured to cover at least a portion of a wound.

The liquid-retention chamber is positioned inside the housing.

The vacuum connection is for coupling to the vacuum source and is in gaseous communication with the liquid-retention chamber.

The liquid barrier is positioned inside the housing and prevents travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow.

According to the patent the claimed device addresses the need for in-home use by a patient, with little supervision, and for easy portability to allow travel and mobility of the patient (paragraph [0003]).

2. Extension of subject-matter

The patent is derived from European application EP 12008236.7, which is a divisional application of European application EP 07794746.3 ("the parent application"). The application as filed comprises the description, the drawings and the claims (as "important aspects of the invention", at the end of the description) of the parent application as filed. For the assessment of added subject-matter it is therefore sufficient to consider the parent application as filed.

2.1 In the impugned decision, the Opposition Division considered that there was no basis in the parent application as filed for the general definition in claim 1 of the main request of the liquid barrier positioned inside the housing, without defining a vacuum chamber and specifying that the liquid barrier subdivided the internal space of the housing into the vacuum chamber and the liquid-retention chamber. The opponents shared the opposition division's view. Opponent 2 further argued that the parent application as filed did not disclose a liquid barrier positioned inside the housing at all, and that a liquid barrier had only been disclosed in the form of a porous hydrophobic film and the definition of this specific form of the liquid barrier could not be omitted.

Claim 1 of the main request is generally based on claim 1 of the parent application as filed, with the addition of the feature of the liquid barrier positioned inside the housing being disclosed in Figures 2 (the liquid barrier 36 within the housing 20) and 3 (the liquid barrier 136 within the housing 120) together with paragraphs [24] and [37] of the parent application as filed.

While the embodiment in Figure 2 comprises both a liquid barrier as claimed and a vacuum chamber within the housing, paragraph [28] of the parent application as filed explains that the liquid barrier, in that embodiment, *"serves to prevent travel of liquid from the liquid-retention chamber 40 to the vacuum connection 30"*.

The embodiment in Figure 3 discloses a different arrangement for the same function, in which the liquid barrier consists of a particular vacuum chamber acting

as a droplet gap (paragraph [37] of the parent application as filed). Irrespective of whether the embodiment in Figure 3 could be considered not to comprise a vacuum chamber within the housing (the vacuum chamber itself serves as a liquid barrier in that embodiment) and irrespective of the specific nature of the liquid barrier in that embodiment, according to paragraph [37] of the parent application as filed the liquid barrier must be disposed between the liquid-retention chamber and the vacuum connection "*to prevent liquids from travelling from the liquid-retention chamber 140 to the vacuum passage 130*".

The argument by opponent 1 that the vacuum chamber was required to distribute the reduced pressure across the area of the liquid barrier is not convincing. The parent application as filed does not mention any such alleged requirement. The person skilled in the art can instead derive from the parent application as filed that the position of the liquid barrier within the housing, irrespective of whether or not a vacuum chamber is present, makes it more convenient to have modular embodiments of the wound therapy device in which only the liquid-retention chamber may be replaced (as discussed in paragraphs [64] and [66]). This is because the liquid-retention chamber can be safely replaced by separating the housing from the vacuum connection and disposing of the whole housing without the need to manipulate other components which have been in contact with bodily fluids.

It follows that the liquid barrier and a vacuum chamber within the housing are not disclosed in the parent application as filed as a necessary combination for achieving a certain technical effect. Hence, these elements are not inextricably linked, irrespective of

whether there may be a structural relationship between the liquid barrier and the vacuum chamber at one of its sides in the embodiment in Figure 2.

As regards the argument by opponent 2 concerning the omission of the definition of the liquid barrier as a porous hydrophobic film, paragraph [28] of the parent application as filed, to which the proprietor referred, discloses various other possible forms of a liquid barrier, which may include "*a porous hydrophobic film, a porous hydrophobic structure, a droplet gap or a labyrinth*". Moreover, paragraph [28] also discloses that "*other technologies that allow gas flow but prevent liquid flow may also be used as suitable liquid barriers*".

In conclusion, the general claim definition of the liquid barrier being positioned inside the housing does not comprise added subject-matter.

2.2 Opponent 2 argued that the definition in claim 1 of the main request of a housing comprising a flexible barrier, without specifying the presence of structural supports, included added subject-matter; however, as the proprietor pointed out, claim 5 of the parent application as filed defines the housing in that same way. Hence, this objection by opponent 2 is not convincing.

2.3 Opponent 2 argued that there was no basis in the parent application as filed for a vacuum source belonging to the wound therapy device as defined in claim 1 of the main request and that a vacuum source had only been disclosed in combination with an adaptor; however, as the proprietor pointed out, paragraph [30] of the parent application as filed discloses "*a vacuum source*

coupled to the vacuum connection". This provides a direct and unambiguous basis for the wound therapy device comprising a vacuum source as claimed. As regards the argument relating to the omission of the adaptor, claim 1 of the main request defines a vacuum connection for coupling to the vacuum source. The term "adaptor" is broad and technically equivalent to the expression "vacuum connection", which is defined in claim 1 of the main request. Hence, nothing is omitted from claim 1 in this respect.

2.4 Opponent 2 argued that claims 10 and 11 included added subject-matter because the properties of the seal they defined had not been disclosed in the parent application as filed; however, paragraph [23] of the parent application as filed discloses a seal for attaching the wound therapy device to a body surface of a patient, whereas paragraph [5] and claim 2 of the parent application as filed disclose the seal as an entity that is distinct from the liquid barrier.

2.5 With the reply to the proprietor's statement of grounds of appeal, opponent 2 raised a number of objections of added subject-matter to claims 1, 3 to 9 and 12 to 17 of the main request which had not been raised before the Opposition Division. The proprietor objected to the admittance of these requests.

According to Article 12(2) RPBA, the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner. Consequently, a party's appeal case must be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based. Article 12(4) RPBA stipulates that any part of a party's appeal case which does not meet the requirements of Article 12(2) RPBA is

to be regarded as an amendment, unless the party demonstrates that this part was admissibly raised and maintained in the proceedings leading to the decision under appeal. Furthermore, the party must clearly identify each amendment and provide reasons for submitting it in the appeal proceedings. Any such amendment may be admitted only at the discretion of the Board, which has to exercise its discretion in view of, *inter alia*, the complexity of the amendment, the suitability of the amendment to address the issues which led to the decision under appeal, and the need for procedural economy.

Opponent 2 did not provide any convincing reasons why the new objections were not raised before the opposition division. Whether or not these objections became apparent when opponent 2 checked the claims of the auxiliary requests cannot justify the late submissions, since it would have been the responsibility of opponent 2 to fully consider the claims of the main request earlier.

Moreover, as the proprietor argued, the new objections do not *prima facie* prejudice the maintenance of the patent on the basis of the main request.

As regards the objection to claim 1 concerning the omission of features relating to the separation of the vacuum connection from the liquid-retention chamber by the liquid barrier, this is merely a matter of semantics.

As regards the objections to the dependent claims, the proprietor's arguments are convincing. The Board mentioned this in the preliminary opinion, to which opponent 2 did not respond. The support structure

defined in claim 3 is based on claim 6 of the parent application as filed. The difference in wording does not imply any different technical information. The absorbent material as defined in claims 4 and 5 is based on paragraph [29] of the parent application as filed. The features of the vacuum source as defined in claims 6 and 7 are based on paragraph [23] and Figures 2 and 3 of the parent application as filed. The fill indicator as defined in claim 8 is based on claim 21 of the parent application as filed. The person skilled in the art would have understood that the function of the fill indicator was independent of the position of the vacuum source. The pressure relief valve as defined in claim 9 is based on claim 17 of the parent application as filed. Any difference in wording does not imply any different technical information. Moreover, the person skilled in the art would have understood that the function of the pressure relief valve was independent of the position of the vacuum source. The features of the liquid barrier as defined in claims 12 to 17 are based on paragraph [28] of the parent application as filed, in which porous and microporous PTFE are specific types of porous hydrophobic films. Moreover, the person skilled in the art would have understood that the function of the liquid barrier was independent of the position of the vacuum source.

For these reasons, the new objections of added subject-matter raised by opponent 2 are not admitted into the appeal proceedings under Article 12(4) RPBA.

2.6 In conclusion, the opponents' objections of added subject-matter under Articles 76(1) and 123(2) EPC do not prejudice the maintenance of the patent on the

basis of the main request.

3. Novelty

3.1 The opponents argued that the subject-matter of claim 1 of the main request was not novel over D1.

The embodiment in Figure 6 (reproduced below and referred to by the opponents) discloses a wound therapy device configured to provide negative pressure therapy to a wound.

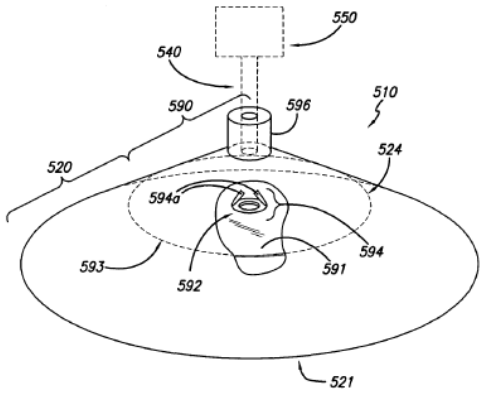


FIG. 6

The device comprises a housing including a flexible overlay (520) and an attached collection chamber (590, which may have a rigid or semi-rigid structure; sentence spanning the left-hand and right-hand column on page 20) positioned inside the housing. The housing is configured to cover at least a portion of a wound. The device further comprises a wound interface layer (flexible membrane 591), a vacuum source (vacuum system 550), a vacuum connection (540 and 596) for coupling to the vacuum source which is in gaseous communication with the liquid-retention chamber, and a liquid barrier (the micropore or hydrophobic filter mentioned in paragraph [0064]), which prevents travel of liquid from the liquid-retention chamber to the vacuum connection while allowing gas flow.

The opponents argued that D1 also disclosed that the liquid barrier was positioned inside the housing, because the pressure supply port 596, within which the micropore or hydrophobic filter was positioned, had to be considered part of the housing.

The Board shares the opposition division's view that the pressure supply port 596 is not part of the housing, but is part of the vacuum connection, since it is described "to operably connect the reduced pressure supply means 540 to the collection chamber 590" (paragraph [0064]). As derivable from Figure 6, the pressure supply port 596 is positioned above the collection chamber as a separate element with a specific function and does not contribute to enclosing the liquid-retention chamber. The argument by opponent 2 that the collection chamber and the port were a single piece is not convincing. This is not disclosed anywhere in D1. Moreover, even if this were the case, the pressure supply port 596 still would not have the function of a housing for containing the liquid-retention chamber.

Since the pressure supply port 596 is not part of a housing according to claim 1 of the main request, the subject-matter of the claim is novel over D1 on account of the liquid barrier positioned inside the housing.

3.2 Opponent 2 argued that the subject-matter of claim 1 of the main request was not novel over D3.

D3 discloses a wound therapy device configured to provide negative pressure therapy to a wound. Figure 1a, referred to by opponent 2, is reproduced below.

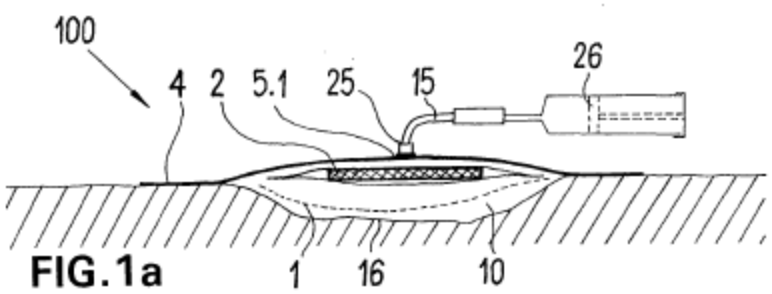


FIG.1a

The wound therapy device comprises a housing in the form of a somewhat rigid wound-covering member (4, paragraph [0033]). The housing comprises a flexible barrier and is configured to cover at least a portion of a wound, as shown in the figure. The wound therapy device further comprises a wound interface layer (film element 1), a liquid-retention chamber positioned inside the housing, a vacuum source (syringe 26) and a vacuum connection (5.1) for coupling to the vacuum source which is in gaseous communication with the liquid-retention chamber.

Opponent 2 argued that the absorbing body 2 was a liquid barrier within the meaning of claim 1 of the main request.

However, the absorbing body 2 is what actually retains liquid within the housing. It has a liquid-permeable outer wall (paragraph [0035]), which allows liquid to travel from the outside to its interior. As a result, the absorbing body 2 swells considerably (Figures 1e and 5). Hence, the interior of the absorbing body 2, and not the whole volume within the housing under the covering member 4, has to be considered a liquid-retention chamber.

The claim requires a liquid-retention chamber and a liquid barrier preventing travel of liquid from the

liquid-retention chamber. Hence, upon a plain reading of the claim, in accordance with the disclosure of the patent as a whole and contrary to the arguments by opponent 2, the liquid barrier and the liquid-retention chamber must be separate entities, with the liquid barrier potentially delimiting the liquid-retention chamber. The opposition division reached the same conclusion (point 6.2 of the Reasons of the impugned decision, third paragraph). It follows that the absorbing body 2 additionally cannot be considered to be a liquid barrier as defined in claim 1 of the main request.

D21 and D22, which were referred to by opponent 2 to explain that a single product can fulfil two or more functions (which is not contested) and were not admitted by the Opposition Division in the impugned decision, cannot change the plain meaning of the claim. Hence, the Opposition Division was correct to consider them to lack *prima facie* relevance and not to admit them into the proceedings. Article 12(6) RPBA prescribes that the Board must not admit evidence which was not admitted in the proceedings leading to the decision under appeal, unless the decision not to admit it suffered from an error in the use of discretion or unless the circumstances of the appeal case justify their admittance. Under this article, D21 and D22 are not admitted into the appeal proceedings.

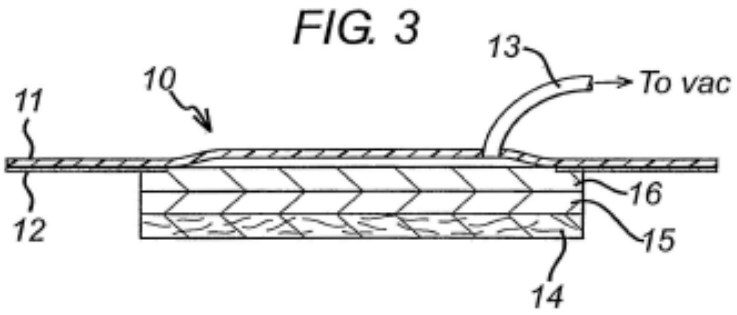
Moreover, even if it were considered that the whole volume within the housing under the covering member 4 was a liquid-retention chamber, liquid retained in the space outside the absorbing body 2 and within this volume would not be prevented from travelling to the vacuum connection. Hence, according to this interpretation, the absorbing body 2 cannot be

considered a liquid barrier as defined in claim 1 of the main request either.

Consequently, the subject-matter of claim 1 of the main request is novel over D3 on account of of the liquid barrier positioned inside the housing.

3.3 Opponent 2 argued that the subject-matter of claim 1 of the main request was not novel over D4.

D4 discloses a wound therapy device configured to provide negative pressure therapy to a wound. Figure 3, referred to by opponent 2, is reproduced below.



The wound therapy device comprises a cover sheet (11), which includes a flexible barrier and is configured to cover at least a portion of a wound. The device further comprises a screen structure with several layers (14, 15 and 16), of which the layer 14 can be considered a wound interface layer (page 2, lines 5 to 10 and page 19, line 28 to page 20, line 8), a vacuum source ("To vac") and a vacuum connection (13) for coupling to the vacuum source.

Opponent 2 argued that the cover sheet 11 was a housing, inside which there was a liquid-retention chamber and a liquid barrier. It identified a liquid-retention chamber as the space under the cover

sheet 11, possibly including the liquid-absorbent layer 16 and a size exclusion membrane separating the layers 15 and 16 (page 20, lines 5 to 8). It stated that the liquid-absorbent layer 16, possibly together with the water-permeable, size exclusion membrane, would anticipate a liquid barrier as defined in claim 1 of the main request too.

The Board shares the proprietor's view that D4 does not disclose a liquid barrier configured to prevent travel of liquid from a liquid-retention chamber to the vacuum connection while allowing gas flow.

D4 is similar to D3 in this respect. What retains liquid within the housing in D4 are the layers 14 and 16 (page 19, line 28 to page 20, line 8). The layers 15 and 16 are separated by a water-permeable, size exclusion membrane (page 20, lines 5 to 8). As explained in relation to D3, claim 1 of the main request defines a liquid-retention chamber and a liquid barrier as separate entities. If the layer 16 is a liquid-retention chamber, it cannot additionally be considered to be a liquid barrier within the meaning of the claim. If it is considered that other layers or the whole volume beneath the cover sheet 11 constitute a liquid-retention chamber, liquid retained outside the layer 16 in the volume beneath the cover sheet 11 is not prevented from travelling from the wound to the vacuum connection by the layer 16 and/or the size exclusion membrane.

As regards the reference by opponent 2 to the embodiment in Figure 11 of the patent, it is true that the liquid-retention chamber according to that embodiment may be filled with absorbent material (paragraph [0050]); however, a separate liquid barrier,

denoted as 36 in Figure 2, is present in the embodiment in Figure 11 too.

As regards the arguments by opponent 2 with reference to D16, the Board notes that the decision of the German Federal Patent Court concerned a different claim and, although of authoritative value, is not binding on the Board. After considering that decision the Board cannot reach the conclusion that the liquid-absorbent layer 16 anticipates a liquid barrier as defined in claim 1 of the main request, for the reasons explained above.

In summary, the subject-matter of claim 1 of the main request is novel over D4 on account of the liquid barrier positioned inside the housing.

3.4 Opponent 2 argued that the subject-matter of claim 1 of the main request was not novel over D5.

D5 discloses a wound therapy device configured to provide negative pressure therapy to a wound. Figure 8a, referred to by opponent 2, is reproduced below.

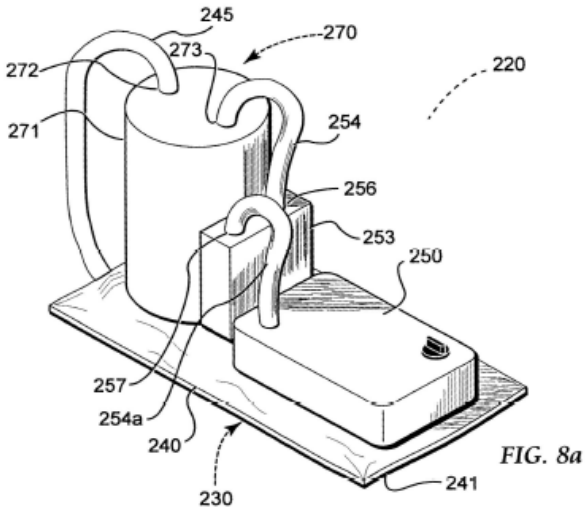


FIG. 8a

The wound therapy device comprises a wound cover (240).

The wound cover may be in the form of a rigid, fluid-impermeable wound cover, configured to cover at least a portion of a wound (paragraph [0073]). Hence, the wound cover can be considered a housing within the meaning of claim 1 of the main request. The device further comprises a liquid-retention chamber (container 271), a vacuum source (250) and a vacuum connection (254a) for coupling to the vacuum source which is in gaseous communication with the liquid-retention chamber. The device further comprises a liquid barrier (filter 253).

As shown in Figure 8a and described in paragraphs [0076] and [0077], the filter 253 is encased in a housing with an inlet port (256) connected by the tubing 254 to the container 271 and an outlet port (257) connected by the tubing 254a to the vacuum source 250. Hence, as the proprietor correctly pointed out, D5 does not disclose a liquid barrier positioned inside a housing comprising a flexible barrier that is configured to cover at least a portion of a wound (such as 240) as defined in claim 1 of the main request.

It follows that the subject-matter of claim 1 of the main request is novel over D5 at least on account of the liquid barrier positioned inside the housing.

3.5 Opponent 2 argued that the subject-matter of claim 1 of the main request was not novel over D6.

D6 discloses a wound therapy device configured to provide negative pressure therapy to a wound. Figures 2b and 2c, referred to by opponent 2, are reproduced below.

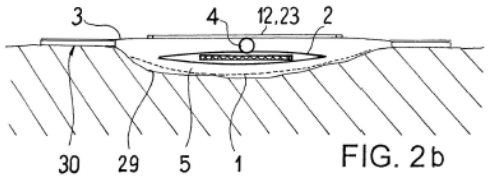


FIG. 2b

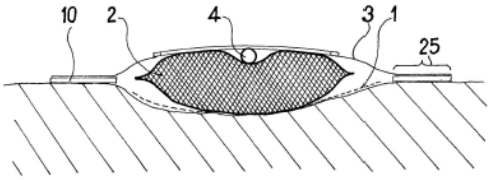


FIG. 2c

The wound therapy device comprises a cover sheet, which includes a flexible barrier and is configured to cover at least a portion of a wound (wound-covering element 3). The device further comprises an absorption body (2), a vacuum source (claim 10), and a vacuum connection (4) for coupling to the vacuum source which is in gaseous communication with the liquid-retention chamber.

Opponent 2 argued that the volume beneath the cover sheet (5, Figure 2b) was a liquid-retention chamber and that the absorption body was a liquid barrier within the meaning of claim 1 of the main request.

D6 is similar to D3 and D4 as far as the liquid-retention chamber and the liquid barrier are concerned. What retains liquid within the volume delimited by the cover sheet is the absorption body 2. If the absorption body 2 is a liquid-retention chamber, it cannot be considered to be a liquid barrier within the meaning of claim 1 of the main request. If it is considered that the whole volume beneath the cover sheet 3 constitutes a liquid-retention chamber, liquid retained outside the absorption body 2 and beneath the cover sheet 11 is not prevented from travelling from the wound to the vacuum

connection by the absorption body 2.

It follows that the subject-matter of claim 1 of the main request is novel over D6 at least on account of the liquid barrier positioned inside the housing.

3.6 Opponent 2 argued that the subject-matter of claim 1 of the main request was not novel over D11.

D11 discloses a wound therapy device configured to provide negative pressure therapy to a wound. Figure 5, referred to by opponent 2, is reproduced below.

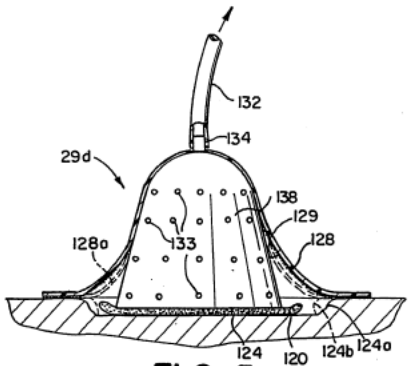


FIG. 5

The wound therapy device comprises a cover sheet (128) which includes a flexible barrier and is configured to cover at least a portion of a wound. The device further comprises a wound interface layer (120), a cup (138) containing a liquid-retention chamber, a vacuum source and a vacuum connection (132 and 134) for coupling to the vacuum source which is in gaseous communication with the liquid-retention chamber.

Opponent 2 argued that the cup 138 was a liquid barrier within the meaning of claim 1 of the main request.

However, there is no disclosure in D11 that the cup 138 would prevent travel of liquid from the liquid-

retention chamber to the vacuum connection while allowing gas flow. Opponent 2 stated that gravity and the distance between the wound 124 and the suction port 134 helped to prevent liquid from reaching the suction port; however, the suction port opens within the cup 138. Gravity as such cannot be understood as a liquid barrier by the person skilled in the art. Moreover, it is not ruled out that, while the device is in use, the cup could be oriented horizontally or even upside down compared with the configuration in Figure 5.

Hence, the subject-matter of claim 1 of the main request is novel over D11 at least on account of the liquid barrier positioned inside the housing.

3.7 Opponent 2 argued that the subject-matter of claim 1 of the main request was not novel over D19 or D23.

D19 was first filed before the Opposition Division, which did not admit it. Opponent 2 filed D23 after its reply to the proprietor's statement of grounds. The admittance of both documents is at the Board's discretion, under Articles 12(6) and 13(1) RPBA, respectively.

As regards D19 the Board sees no reason to overturn the Opposition Division's discretionary decision. It held that D19 did not disclose, *prima facie*, any housing within the meaning of claim 1 of the main request, and the Board agrees, since the membrane 224 (Figures 2 and 3) is not a housing within the meaning of the claim. Moreover, D19 is similar to D4. *Prima facie*, it does not disclose a liquid barrier positioned inside a housing either.

D23 is similar to D3, D4 and D6 as far as the disclosure of a liquid-retention chamber and a liquid barrier is concerned. *Prima facie*, it is no more relevant than these documents. Whether it was filed in case T 2490/22 is of no relevance in this respect.

For these reasons D19 and D23 are not admitted into the appeal proceedings (Articles 12(6) and 13(1) RPBA).

3.8 In conclusion, the novelty objections (Article 54 EPC) raised by the opponents do not prejudice the maintenance of the patent on the basis of the main request.

4. Inventive step

4.1 The opponents argued that the subject-matter of claim 1 of the main request was not inventive when starting from D1, D3 or D11. The proprietor submitted that the objection raised by opponent 1 starting from D1 and the objection raised by opponent 2 starting from D11 should not be admitted into the appeal proceedings. The Board decided to take these objections into consideration; however, as explained below, they are not convincing.

4.2 Starting from D1, this document does not disclose a liquid barrier positioned inside the housing as defined in claim 1 of the main request.

Opponent 1 argued that this distinguishing feature was a trivial matter of design, since it did not solve any technical problem over the arrangement in D1. The liquid barrier would perform precisely the same function whether it was positioned in an outlet of the housing in the form of a pressure supply port or just within the housing itself, for example across the mouth

of the outlet.

The Board, however, shares the proprietor's view that a liquid barrier as defined in claim 1 of the main request has the technical effect of preventing travel of liquid to the vacuum connection, ensuring that wound exudate is confined to regions of the device positioned below the wound cover. This makes it possible to have modular embodiments of the wound therapy device in which only the liquid-retention chamber can be replaced by separating the housing from the vacuum connection. The housing can then be disposed of and the vacuum connection can be reused without the need to manipulate, replace or sterilise other components which have been in contact with bodily fluids. In D1, as opponent 1 pointed out, the pressure supply port would instead have to be replaced together with the housing.

In conclusion, the distinguishing feature solves the objective technical problem of providing a device which is safer and easier, especially for home use.

The problem proposed by opponent 2 based on alleged advantages of manufacturing different components in a single piece, i.e. to improve the reliability and durability of the wound therapy device, is neither expressly taught in nor derivable from the patent in suit. The patent mentions modular arrangements instead, which go against manufacturing distinct functional components together.

The person skilled in the art would not have been prompted, in particular by common general knowledge, to implement the distinguishing feature in the wound therapy device in D1 to solve the objective technical problem. Moreover, as the proprietor pointed out, it is

at least not ruled out that the housing in D1 may collapse in use. This would involve the risk of a liquid barrier positioned inside the housing potentially being brought into contact with the wound and becoming occluded by wound exudate. For this reason too, the person skilled in the art would not have been prompted to change the position of the liquid barrier in the device in D1 as defined in claim 1 of the main request.

4.3 Starting from D3 or D11, neither of these documents discloses a liquid barrier positioned inside the housing as defined in claim 1 of the main request.

The objective technical problem solved by this distinguishing feature, as explained with regard to D1, is to provide a device which is safer and easier, especially for home use. The problem proposed by opponent 2 in relation to D3, i.e. that of protecting the vacuum source from contamination with wound exudate, is not related to the specific position of the liquid barrier as claimed.

D7 and D8, referred to by opponent 2, concern bulky wound drainage systems, which do not comprise a liquid barrier within a housing configured to cover at least a portion of a wound as claimed. D7 discloses filters 266 and 278 within a drain reservoir remote from the wound (Figure 2). D8 discloses a filter 108 which is also within a drain reservoir remote from the wound (Figure 6). As explained above, D1 does not disclose a liquid barrier within a housing configured to cover at least a portion of a wound either.

It follows that the person skilled in the art would not have been prompted by the cited documents to implement

the distinguishing feature in the wound therapy devices in D3 or D11 to solve the objective technical problem.

4.4 In conclusion, the objections of lack of inventive step (Article 56 EPC) raised by the opponents do not prejudice the maintenance of the patent on the basis of the main request.

5. Proprietor's request for apportionment of costs

The proprietor requested an apportionment of costs against opponent 2, in essence because the late filing of several objections was contrary to the need for procedural efficiency and was an abuse of procedure.

However, the Board considers that repeatedly filing new objections and evidence does not amount to an abuse of procedure, but is an acceptable procedural strategy. Such a strategy remains within opponent 2's legitimate interests and opponent 2 is free to present its case as it wishes, although the Board doubts that it will be effective for achieving its objective.

It was then for the Board to decide whether or not to admit the late-filed objections and evidence, in view of the need for procedural efficiency, *inter alia*.

Hence, the proprietor's request for apportionment of costs against opponent 2 must be rejected (Article 16(1) RPBA and Article 104(1) EPC).

6. As none of the opponents' objections prejudices the maintenance of the patent according to the main request, the patent has to be maintained as such (Article 101(3)(a) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the Opposition Division with the order to maintain the patent in the following version:

   - claims 1 to 18 of the main request, filed with letter dated 27 January 2023,
   - the description and the drawings of the patent specification.

3. The request for apportionment of costs against opponent 2 is rejected.

The Registrar: The Chairman:

A. Chavinier-Tomsic M. Alvazzi Delfrate

Decision electronically authenticated