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D E C I S I O N
of 13 October 1995

Case Number: T 0077/92 - 3.2.2
Application Number: 86307800.2
Publication Number: 0220860
IPC: A61B 5/10, A61B 10/00

Language of the proceedings: EN

Title of invention:

Measuring tape for directly determining physical treatment and physiological values

Applicant:

Broselow, James B.

Opponent:

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Headword:

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Relevant legal provisions:

EPC Art. 52(1), (2)(d) and (3), 111(1)

Keyword:

"Patentable inventions - presentation of information"

Decisions cited:

T 1002/92, T 0833/91, T 0603/89

Catchword:

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Case Number: T 0077/92 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 13 October 1995

Appellant: Broselow, James B.
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Decision under appeal: Decision of the Examining Division of the European Patent Office dated 2 September 1991 refusing European patent application No. 86 307 800.2 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: H. Seidenschwarz
Members: P. Dropmann
J.-C. De Preter

Summary of Facts and Submissions

- I. A Notice of Appeal was filed against the decision of the Examining Division refusing European patent application No. 86 307 800.2 on the ground that the subject-matter of Claims 1 to 5 filed with the letter of 16 November 1990 did not define an invention within the meaning of Article 52(1) and 52(2)(d) EPC (presentation of information).
- II. Together with the Statement of Grounds, the Appellant filed new Claims 1 to 5 and requested that these claims be considered as the basis of the appeal.
- III. These claims read as follows:
- "1. A method of selecting the correct patient treatment values in emergency situations, comprising: measuring the body length of the patient, using a tape (10) having increments (20, 21, 22 ...) of heel-to-crown length, each increment bearing indications of correct drug dosage appropriate to that increment, and predetermined by a co-relation between the measured heel-to-crown height of a patient and a correct drug dosage value, and rapidly selecting the correct drug dosage without the exercise of clinical expertise, calculation or reference to other data sources.
2. A method of selecting the correct patient treatment values in emergency situations, comprising: measuring the body length of the patient using a tape (10) having increments (20,

21, 22 ...) of heel-to-crown length, each increment bearing indications of correct defibrillation technique, the value of which is expressed as an energy measurement appropriate to that increment, and predetermined by a co-relation between the measured heel-to-crown height of the patient and a correct defibrillation technique energy value, and rapidly selecting the correct energy value without the exercise of clinical expertise, calculation or reference to other data sources.

3. A method of selecting the correct patient treatment values in emergency situations, comprising: measuring the body length of the patient using a tape (10) having increments (20, 21, 22 ...) of heel-to-crown length, each increment bearing indications of medical apparatus, the value of which is expressed in apparatus size, appropriate to that increment, and predetermined by a co-relation between the measured heel-to-crown height of a patient and a correct apparatus size, and rapidly selecting the correct apparatus size without the exercise of clinical expertise, calculation or reference to other data sources.
4. A method as claimed in Claim 3, in which the apparatus size is the size of an endotracheal tube.
5. A method of determining the correct patient treatment values in emergency situations, comprising: measuring the body length of the

patient, using a tape (10) having increments (20, 21, 22 ...) of heel-to-crown length, each increment bearing indications of more than one of: drug dosage, defibrillation technique energy value and apparatus size, appropriate to that increment, and predetermined by a co-relation between the measured heel-to-crown height of the patient and drug dosage, energy value and apparatus size, and rapidly selecting more than one of the correct drug dosage, defibrillation technique energy value and apparatus length without the exercise of clinical expertise, calculation or reference to other data."

Reasons for the Decision

1. The appeal is admissible.
2. No objections under Article 123(2) EPC arise against present Claims 1 to 5.

These claims essentially correspond to those of 16 November 1990 but incorporate the amendments already considered in the decision under appeal. At the end of Claim 5 "apparatus length" should read "apparatus size".

3. *Article 52(2) and (3) EPC*
 - 3.1 When considering the question whether the subject-matter of an application falls within the provisions of Article 52(2) and (3) EPC, in particular when considering the criterion "technical contribution to

the prior art" (see point 3.2 below), it should be borne in mind that this question is separate and distinct from the question whether the subject-matter is new, involves an inventive step and is susceptible of industrial application (see Guidelines for Examination in the European Patent Office, C-IV, 2.2, last paragraph, and concerning inventive step see also decision T 1002/92, OJ EPO 1995, 605, point 1, last paragraph).

- 3.2 According to the case law established by the Boards of Appeal, an invention is not excluded from patentability under Article 52(2) and (3) EPC if the subject-matter claimed, which has to be assessed as a whole, is technical in character or provides a technical contribution to the prior art, i.e. a contribution in a field not excluded from patentability. In decision T 833/91, point 3.1 (not published in the Official Journal EPO) it is stated that "the technical contribution to the art rendering a claimed invention an invention in the sense of Article 52(1) EPC and thus patentable, may lie either in the problem underlying, and solved by, the claimed invention, or in the means constituting the solution of the underlying problem, or in the effects achieved in the solution of the underlying problem".

In accordance with the decision T 603/89 (OJ EPO 1992, 230, point 2.5), which deals with the provision of Article 52(2)(d) and (3) EPC (presentations of information as such), the subject-matter as a whole of a claim consisting of a mix of known technical elements and of non-technical elements is not excluded from patentability under Article 52(2) and (3) EPC when the

non-technical elements interact with the known technical elements in order to produce a technical effect.

- 3.3 In the present case, the invention as claimed in independent Claims 1, 2, 3 and 5 concerns a method of selecting, in emergency situations, the correct patient treatment values, namely drug dosage, defibrillation technique energy and/or apparatus size. The method comprises measuring the body length of the emergency patient using a particular tape and rapidly selecting the said correct patient treatment values without the exercise of clinical expertise, calculation or reference to other data sources. The particular tape used has increments of heel-to-crown length, each increment bearing indications of the correct treatment value appropriate to that increment and predetermined by a co-relation between the measured heel-to-crown height of a patient and a correct treatment value.

As accepted by the Appellant, the feature of the claims that the tape has indications of patient treatment values can be regarded as a presentation of information, i.e. as a non-technical feature within the meaning of Article 52(2) EPC.

- 3.4 In order to decide whether or not the claimed subject-matter as a whole provides a technical contribution to the prior art and is thus to be regarded as an invention within the meaning of Article 52(1) EPC, the prior art has to be defined.

The Examining Division considered document FR-A-411 334 (D3) as starting point in this respect and took the

view that the claimed methods differ from the state of the art in that particular tapes are to be used whose construction does not include any new technical feature as compared to the tape known from document D3. The Examining Division concluded that the contribution which the methods of Claims 1 to 5 add to the known art lies exclusively in the information printed on the tape, that this presentation of information, however, is of non-technical character and that therefore the subject-matter of Claims 1 to 5 does not define an invention within the meaning of Article 52(1) EPC.

3.5 The above assessment by the Examining Division, however, does not take account of the fact that document D3 does not disclose a method of selecting the said correct patient treatment values in emergency situations, but rather discloses a method of determining the amount of food to be given to an infant using a tape marked with both measurements of length and quantities of food to be given to the infant depending on the measurements. Thus, the purposes underlying the claimed subject-matter and the prior art are different. The distinction between the claimed method and the previously known method is not restricted to the different kinds of information printed on the tapes, thus creating a further contribution to the art.

In particular, the decision under appeal does not adequately evaluate the co-relation between the heel-to-crown length of a patient and each of the treatment values provided on the measuring tape. This co-relation between the measured length and the information on the tape measure results in the tape used in the claimed

methods becoming a new gauge for directly measuring the patient treatment values, just as an altimeter is obtained merely by replacing the scale of a pressure gauge with a scale indicating altitude. Such a new gauge for directly measuring the patient treatment values is clearly technical in character.

The Examining Division's interpretation of the feature concerning the indications printed on the tape, in isolation from the remaining wording of the claim and out of its context disregards the claimed technical co-operation between the claimed features and the teaching of the claim as a whole and is not justified (cf. decision T 1002/92, points 2.4 and 2.5, OJ EPO 1995, 605).

- 3.6 Hence, in the light of the technical nature of the subject-matter claimed, the subject-matter of Claims 1 to 5 is not excluded from patentability under Article 52(2)(d) and (3) EPC and defines an invention within the meaning of Article 52(1) EPC.

- 3.7 The same result is achieved when, as suggested by the Appellant, the starting point for determining the contribution to the prior art is not document D3, which discloses measuring the amount of food to be given to a growing infant (see points 3.4 and 3.5 above), but that of selecting dosages etc. in emergency situations. Following the Appellant's argument, prior to the present invention (but assuming that the practitioner was aware of the co-relation between heel-to-crown height and drug dosage etc.), the method would have comprised three steps, namely

- (i) measuring the length of the patient,
- (ii) referring to a table or chart in which the drug dosage etc. are related to lengths, and
- (iii) selecting the correct drug dosage.

By using the particular tape, the method according to the invention eliminates the intermediate step (ii) and thus saves time and also eliminates a possible source of error. These effects can be vital, are technical in nature and add to the technical contribution stated in point 3.5 above.

4. *Article 111(1) EPC*

Since the claimed invention is not excluded from patentability under Article 52(2) and (3) EPC, examination has to be carried out as to whether the invention meets the further requirements of Article 52(1) EPC, namely novelty, inventive step and industrial applicability.

As stated at page 1 of the Appellant's letter dated 16 November 1990, the Examiner mentioned at an interview that because of the change from apparatus to method claims, it might be necessary to carry out a further search. In view of this situation it is, in the Board's judgement, appropriate not to examine the case on its merits, but to exercise its power under Article 111(1) EPC and to remit the case to the Examining Division for further prosecution. When assessing the inventive step, particular attention

should be directed to documents D3 and D4 (US-A-3 531 866).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

S. Fabiani

H. Seidenschwarz