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**Datasheet for the decision
of 4 July 2008**

Case Number: T 0800/05 - 3.2.02

Application Number: 99949574.0

Publication Number: 1109504

IPC: A61B 18/14

Language of the proceedings: EN

Title of invention:

Electrosurgical device for cell necrosis induction

Applicant:

Rita Medical Systems, Inc.

Opponent:

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Headword:

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Relevant legal provisions:

EPC Art. 52(1), 54, 56

Relevant legal provisions (EPC 1973):

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Keyword:

"Inventive step (yes, after amendment)"

Decisions cited:

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Catchword:

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Case Number: T 0800/05 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 4 July 2008

Appellant:

Rita Medical Systems, Inc.
967 North Shoreline Boulevard
Mountain View
CA 94043 (US)

Representative:

Harris, Ian Richard
D Young & Co.
120 Holborn
London EC1N 2DY (GB)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 1 March 2005
refusing European application No. 99949574.0
pursuant to Article 97(1) EPC 1973.

Composition of the Board:

Chairman: T. Kriner
Members: S. Chowdhury
M. J. Vogel

Summary of Facts and Submissions

I. This appeal is against the decision of the examining division dated 1 March 2005 to refuse European patent application No. 99 949 574.0.

The grounds of refusal were that the subject-matter of claim 1 of each of the main request and auxiliary request lacked an inventive step, having regard to document D1 (WO-A-97/06 855).

II. On 3 May 2005 the appellant (applicant) lodged an appeal against the decision and paid the prescribed fee on the same day. On 11 July 2005 a statement of grounds of appeal was filed.

The appellant requests that the decision under appeal be set aside and that a patent be granted on the basis of the following documents:

Claims 1 to 19 filed by telefax on 26 June 2008

Description pages 12 and 15 filed by telefax on 25 June 2008

Description pages 1 to 3, 6 to 11, 13 and 14, and 16 to 20 filed by telefax on 26 June 2008

Description pages 4 and 21 filed by telefax on 27 June 2008

Figures 1, 2(a), 2(b), and 3 to 21 as originally filed.

III. Independent claim 1 reads as follows:

"A cell necrosis apparatus (10) for use with an energy source (40), comprising an introducer (12) with a distal end (14) sufficiently sharp to penetrate tissue, further comprising: an energy delivery device (16) including at least a first set of RF electrodes (42) and a second set of RF electrodes (44), each electrode of the first and second sets having a tissue piercing distal end, being positionable in the introducer, and being deployable with curvature from the distal end (14) of the introducer (12), the apparatus further comprising: an advancement member (30) coupled to the first and second sets of electrodes of the energy delivery device for their simultaneous deployment from the distal end (14) of the introducer (12), and wherein the second set of electrodes is deployable a greater distance from the introducer than the first set of electrodes."

Claims 2 to 18 are dependent claims.

Reasons for the Decision

1. The appeal is admissible.

2. *Amendments*

2.1 New claim 1 is based on original claim 1, and includes the following additional features:

"an advancement member (30) coupled to the first and second sets of electrodes of the energy delivery device

for their simultaneous deployment from the distal end (14) of the introducer (12)".

2.2 The embodiment described with reference to Figures 2(a) and 2(b) of the application (WO-A-00/13602) includes an electrode advancement member 30 by which the electrodes can be deployed simultaneously (page 12, lines 16 to 18). On page 10, lines 3 to 7 are described (with reference to the apparatus of Figure 1) ways in which electrodes may be advanced to different lengths, namely the lengths can be determined by the actual physical length of electrodes, the length of an energy delivery surface of electrodes, or the length of electrodes that is not covered by an insulator. It is clear that such an arrangement is applicable to the embodiment of Figures 2(a) and 2(b), so that the electrodes thereof may be advanced simultaneously, yet exhibit different lengths when deployed.

2.3 Therefore, claim 1 is properly supported by the application as originally filed in this respect.

3. *Novelty*

3.1 Document D1 discloses (see particularly Figure 3a and the corresponding description on page 15) apparatus (10) for use with an energy source, comprising an introducer with a distal end sufficiently sharp to penetrate tissue, further comprising: an energy delivery device including at least a first set of electrodes (antennas 16) and a second set of electrodes (16), each electrode of the first and second sets having a tissue piercing distal end, being positionable in the introducer, and being deployable with curvature from the distal end of

- the introducer, the apparatus further comprising: an advancement member coupled to the first and second sets of electrodes of the energy delivery device for their deployment from the distal end of the introducer.
- 3.2 D1 discloses that each antenna 16 has an adjustable length (D1: page 7, lines 6-8), that each antenna 16 can have different lengths (D1: page 8, line 3), and that the antennas 16 can be independently deployed along different positions along the axis of the antenna 14 (D1: page 15, lines 5-8). If each antenna can have an adjustable length and is independently deployable, then one set of electrodes of D1 is deployable a greater distance from the introducer than another set of electrodes.
- 3.3 D1 also discloses the antennas can be independently or dependently deployed (page 15, line 6). Assuming that "dependently" means "simultaneously" in the context, this passage means that the electrodes may indeed be deployed simultaneously. However, in this case they would be simultaneously deployed to the same distance since the unequal deployment length is conditional, in this device, upon independent deployment.
- 3.4 Therefore, D1 does not disclose an advancement member for the simultaneous deployment of the electrodes such that the second set of electrodes is deployable a greater distance from the introducer than the first set of electrodes.
- 3.5 Thus, the apparatus claim 1 of the main request is novel.

4. *Inventive step*

4.1 The distinguishing features set out in point 3.4 above bring about the following advantages: The simultaneous deployment of the different electrode sets simplifies the deployment procedure as compared to sequential deployment of the different electrodes as is known from D1, and the spatial relations between the different sets of electrodes may be maintained at all times as compared to sequential deployment. Moreover, simultaneous deployment takes the guess work out of the procedure to ensure consistent and accurate deployment, which directly impacts on the effectiveness of the apparatus for its intended use.

4.2 Neither these features nor their advantages are disclosed or suggested in the available prior art. Therefore, the apparatus of claim 1 involves an inventive step.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of the first instance with the order to grant a patent on the basis of the following application documents:

Claims 1 to 19 filed by telefax on 26 June 2008

Description pages 12 and 15 filed by telefax on 25 June 2008

Description pages 1 to 3, 6 to 11, 13 and 14, and 16 to 20 filed by telefax on 26 June 2008

Description pages 4 and 21 filed by telefax on 27 June 2008

Figures 1, 2(a), 2(b), and 3 to 21 as originally filed.

The Registrar

The Chairman

V. Commare

T. Kriner



Case Number: T 0800/05 - 3.2.02

D E C I S I O N
of 22 October 2008
correcting errors in the decision
of the Technical Board of Appeal 3.2.02
of 4 July 2008

Appellant: Rita Medical Systems, Inc.
967 North Shoreline Boulevard
Mountain View
CA 94043 (US)

Representative: Harris, Ian Richard
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pursuant to Article 97(1) EPC 1973.

Composition of the Board:

Chairman: T. Kriner
Members: S. Chowdhury
M. J. Vogel

Decision

In application of Rule 140 EPC the decision of 4 July 2008 is hereby corrected as follows:

"Claims 1 to 19 filed by telefax on 26 June 2008" is replaced by

"Claims 1 to 18 filed by telefax on 26 June 2008"

"Description pages 1 to 3, 6 to 11, 13 and 14, and 16 to 20 filed by telefax on 26 June 2008" is replaced by

"Description pages 1 to 3 and 6 to 20 filed by telefax on 26 June 2008".

The Registrar

The Chairman

V. Commare

T. Kriner