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# Datasheet for the decision of 8 February 2008

**Case Number:** T 1100/05 - 3.2.02

**Application Number:** 03076756.0

**Publication Number:** 1340463

**IPC:** A61B 17/128

**Language of the proceedings:** EN

**Title of invention:**
Surgical device with malleable shaft

**Applicant:**
Allegiance Corporation

**Opponent:**
-

**Headword:**
-

**Relevant legal provisions (EPC 1973):**
EPC Art. 54(1)

**Keyword:**
"Novelty (no)"

**Decisions cited:**
-

**Catchword:**
-

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**Case Number:** T 1100/05 - 3.2.02

# D E C I S I O N
**of the Technical Board of Appeal 3.2.02**
**of 8 February 2008**

**Appellant:** Allegiance Corporation
1430 Waukegan Road
McGaw Park
Illinois 60085 (US)

**Representative:** Dee, Ian Mark
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**Decision under appeal:** **Decision of the Examining Division of the European Patent Office posted 22 April 2005 refusing European application No. 03076756.0 pursuant to Article 97(1) EPC.**

**Composition of the Board:**

**Chairman:** T. Kriner
**Members:** M. Noel
A. Pignatelli

## Summary of Facts and Submissions

I. European patent application No. 03076756.0 was refused by decision of the examining division dated 22 April 2005 on the ground that the claimed subject-matter lacked inventive step vis-à-vis the state of the art represented, in particular, by document:

D2: US-A-5 603 443.

II. The appellant (applicant) lodged an appeal on 14 June 2005 and paid the appeal fee on 16 June 2005. A statement setting out the grounds of appeal was filed on 18 August 2005.

The appellant requested that the application be allowed on the basis of the set of claims filed with the letter of 7 April 2004 and refused by the first instance. Auxiliarily he requested oral proceedings.

III. In consequence of a communication of the Board annexed to the summons to oral proceedings dated 15 November 2007, questioning the novelty of claim 1 at issue vis-à-vis document D2, the appellant informed the Board by letter of 18 January 2008 that he would not be attending the oral proceedings.

Instead he requested that a decision on the state of the file as it stands, be issued.

IV. Claim 1 reads as follows:

"A surgical device (510) having a longitudinal axis extending between a proximal end and a distal end, comprising:

tissue engaging means (516) including first and second opposed jaws (646,648) for grasping, securing, and occluding body tissue and conduits, the tissue engaging means further including a hinged end at which the jaws are hinged together;

a shaft member (514) operatively coupled to the tissue engaging means, the shaft member capable of being placed in different curvatures;

a handle assembly (512) operatively coupled to the shaft member and to the tissue engaging means;

a jaw actuating means (531) for actuating the jaws of the tissue engaging means between an open position and a closed position, the actuating means operatively connected to the tissue engaging means and to the handle assembly;

wherein the tissue engaging means is biased in an open position and is further provided with a socket for coupling to the jaw actuating means; and

the shaft member (514) comprises soft metal tubing with the jaw actuating means (531) extending axially therethrough."

## Reasons for the Decision

The Board draws the attention of the party to the fact that, since this decision is issued after the entry into force of the EPC 2000 on 13 December 2007, the transitional provisions according to Article 7 of the

Act revising the EPC of 29 November 2000 and the Decisions of the Administrative Council of 28 June 2001 and of 7 December 2006, Article 2, have been applied. When Articles or Rules of the old version of the EPC (1973) are cited, the year is indicated.

1. The appeal is admissible.

2. *Novelty*

2.1 Claim 1 in suit relates to a surgical device, generally. Since D2 is also concerned with a surgical instrument which belongs to a closely related technical field, where the problem of providing more convenient access to restricted surgical sites by means of a flexible support shaft is addressed in the same way, the person skilled in the art would consider this document as a relevant starting point for assessing patentability of claim 1.

2.2 D2 discloses, following the wording used in claim 1:

a surgical device 50 (see Figure 1) having a longitudinal axis extending between a proximal end and a distal end;

the device comprising tissue engaging means 60 (head assembly) including first and second opposed jaws 64,66 and further including a hinged end at which the jaws are hinged together (pivot pin 254; Figure 7; column 15, lines 60 to 65). Although D2 is more specifically directed to surgical stapling instruments, the jaws of the tissue engaging means are nevertheless

provided for securing and occluding various body tissues and conduits (see column 3, lines 33 to 47);

the device further comprising a shaft member 70,76 (shaft assembly) operatively coupled to the tissue engaging means 60, with the shaft member capable of being placed in different curvatures (see Figure 3; column 3, lines 57 to 63; column 4, lines 13 to 16; column 8, line 63 to column 9, line 1);

the device further comprising a handle assembly 80 operatively coupled to the shaft member 70 and to the tissue engaging means 60 (see Figure 2; column 8, lines 53 to 56; column 9, lines 7 to 10);

the device further comprising a jaw actuating means 170 (closure cable) for actuating the jaws 64,66 of the tissue engaging means 60 between an open position and a closed position, the actuating means 170 operatively connected to the tissue engaging means 60 and to the handle assembly 80 (see Figures 10,11; column 11, lines 14 to 19; column 16, lines 16 to 28).

Furthermore, the tissue engaging means 60 is biased (by a compression return spring 274) in an open position and is provided with a socket 272 for coupling to the jaw actuating means 170 (see Figure 11; column 16, lines 19 to 28).

Finally, the device according to D2 discloses a shaft member 70,76 comprising a soft metal tubing 182 with the jaw actuating means 170 extending axially therethrough (see Figures 4, 5 and 48; column 13, lines 47 to 55).

Since the cable support tube 182 is preferably made of a malleable metal such as aluminium, which allows the flexible shaft 76 to assume its bent or curved shape in any radial direction (see column 11, lines 46 to 52), the last feature of claim 1 is also known from D2, given that, as specified in the present application (paragraph [29]), aluminium is a soft metal that is bendable and can be placed in different shapes.

2.3 It results from the foregoing that the subject-matter of claim 1 is not novel vis-à-vis the disclosure of D2. Therefore, the requirements of Article 54 EPC (1973) are not met and the decision under appeal has to be upheld.

## Order

## For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

V. Commare T. Kriner