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**D E C I S I O N**  
**of 8 March 2002**

**Case Number:** T 1151/98 - 3.2.2

**Application Number:** 94890147.5

**Publication Number:** 0642773

**IPC:** A61F 2/08

**Language of the proceedings:** EN

**Title of invention:**  
Biological replacement ligament

**Applicant:**  
Johnson, Lanny L.

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 84, 123(2)  
EPC R. 88

**Keyword:**

"Correction of error (allowed)"  
"Not extended subject-matter resulting from the correction"

**Decisions cited:**

T 0133/85

**Catchword:**

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Case Number: T 1151/98 - 3.2.2

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.2**  
**of 8 March 2002**

**Appellant:** Johnson, Lanny L.  
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Michigan 48823 (US)

**Representative:** Haffner, Thomas M., Dr.  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 25 September 1998  
refusing European patent application  
No. 94 890 147.5 pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** W. D. Weiß  
**Members:** M. G. Noël  
J. C. M. De Preter

## Summary of Facts and Submissions

I. The Examining Division refused European patent application No. 94 890 147.5 on grounds of Article 123(2) EPC, arguing that the replacement in claim 1 of the expression "sized and shaped to stimulate a natural ligament" by the expression "sized and shaped to reproduce the function of a natural ligament" had no basis in the original application.

Further, the alledged error according to which the term "stimulate" should have been "simulate" was not immediately evident from the application as filed, since only the first term was mentioned in the description. Consequently, a correction of error could no be allowed under Rule 88 EPC.

II. The appellant (applicant) lodged an appeal against this decision and, on 25 November 1998, filed a statement of grounds based on the claims as refused. On 4 December 2001, it submitted a new set of amended claims with the view to assist in accelerating the appeal proceedings.

III. In a communication of the Board dated 21 December 2001, the appellant was informed that the application would be acceptable, provided that further amendments be made in claim 1 and in the description, in order to remove objections still pending under Articles 84 and 123(2) EPC.

IV. In a reply dated 13 February 2002, the appellant submitted replacement pages of the application, following the suggestions of the Board.

A favourable decision is requested, confirming the

provisional opinion of the Board, and based on the following application documents:

- description**      page 1 as submitted by letter of  
                         13 February 2002  
                         pages 2 and 9 as submitted on 21 July  
                         1997  
                         pages 3 to 8 as originally filed
- claims**            claims 1 to 14 as submitted by letter of  
                         13 February 2002
- drawings**        sheets 1 to 5 as originally filed.

V.      Claim 1 reads as follows:

"A biological replacement ligament (10) which reproduces the function of a natural ligament, comprising a core and an outer sheath, **characterized** by a non fibrous compressible core (12), and a separate flexibly deformable outer sheath (14) having a first end (22), a second end (24), and a generally tubular intermediate portion (26) which surrounds the compressible core (12), the outer sheath (14) being constructed and arranged with respect to the compressible core (12) such that the application of tension to the first (22) and second ends (24) causes the intermediate portion (26) to constrict upon the compressible core (12) thereby allowing elongation of the ligament (10) and modulation of the tension on the first (22) and second ends (24), the amount of elongation and tension modulation being primarily determined by the compressibility to the core (12)."

## Reasons for the Decision

1. The appeal is admissible.

2. *Amendments*

The precharacterising portion of claim 1 is supported by the application as filed (page 1, lines 6 to 8 and lines 9 to 10) and by the corresponding passages of description as restored by the appellant's submission of 13 February 2002.

All the features in the characterising portion originate from claim 1 as originally filed and are properly supported by the original description.

The feature of claim 2 is derived from claim 1 as filed;

claims 3 to 14 are identical to the corresponding original claims.

Therefore, the amended claims are clear and supported by the description and do not extend beyond the content of the application as filed, in accordance with the requirements of Articles 84 and 123(2) EPC.

3. *Correction of errors*

Claim 1 as filed stated "sized and shaped to stimulate a natural ligament". Although this wording was not supported by the original description an objection under Article 84 EPC could not stand since, during examination, it would have been possible to adapt the description so as to incorporate subject-matter

originally only disclosed in the claims.

In the present case, it is obvious that a typing error was introduced in claim 1 at the time the European application was filed and that the word "stimulate" should have read "simulate". As a matter of fact, the invention relates from the beginning to a "biological replacement ligament" (page 1, line 6), the function of which is to "replace" (page 1, line 11) a damaged natural ligament, ie to "reproduce" (page 1, line 7 and page 2, line 10) in the meaning of "simulate", the function of a natural ligament.

The confusion of the first instance (as well as the typing error of the applicant) probably originates from the fact that the word "stimulate" (wrongly) introduced in claim 1 as filed, was already (rightly) used in the description but in a different context. In the description, "stimulate" (page 8, line 17) or "stimulus" (page 8, line 25) is used within the meaning of "facilitate fibrous tissue formation" (page 8, lines 16 to 17) or "capacity to form fibrous tissue" (page 8, line 9), ie in order to assist in the reconstitution of the fibrous tissue structure. This result or effect is different from the previous notion of simulation, replacement or substitution of a damaged natural ligament by a biological ligament.

It results therefrom that the error is obvious and that a correction under Rule 88 EPC is allowed. Further, the amendment made to claim 1 does not lead to extended subject-matter with respect to the application as filed since the contested wording has been replaced by a wording taken directly from the original description. Therefore, Article 123(2) EPC is also met.

In this respect, it should be noticed that during examination of an application the scope of a claim can be modified in either a restrictive or a broadening manner, provided that its subject-matter after amendment had been already disclosed within the content of the application as filed (cf. T 135/85, OJ EPO 1988, 441, Points 4 and 5). This is obviously the case here.

4. *Remittal*

Since the refusal by the Examining Division was principally based on formal deficiencies under Article 123(2) EPC, now removed, and considering that the claims have been further modified by the appellant, the Board considers it appropriate to remit the case to the first instance for further prosecution on the substantive issues.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division for further prosecution, on the basis of the application documents listed in above point IV.

The Registrar:

The Chairman:

V. Commare

W. D. Weiß