

# De Minimis Defence

[Williams v R \[1978\] HCA 49](#)

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I frequently hear of cases where police charge people with possession of negligible quantities of proscribed drugs. Sadly, many of these people plead guilty as a matter of convenience and end up with undeserved criminal records. This paper aims to explain the de minimis<sup>1</sup> defence to assist lawyers practising in NSW.

## Facts of Williams

Police arranged for a botanist to microscopically analyse the lint from the pockets of two coats belonging to Mr Williams. The botanist reported that the lint contained 'micrograms' of cannabis sativa but readily conceded that this was not a 'usable' quantity of the drug. Unfortunately, Mr Williams admitted that the coats were his and that the lint was 'probably cannabis.

Mr Williams was found guilty by a magistrate and his conviction was affirmed by the Queensland Court of Criminal Appeal. The High Court of Australia took a different view, however, and quashed his conviction. The majority applied the Common Sense & Reality test while the minority relied on the lack of the mental element of intention.

## Common Sense & Reality

Gibbs & Mason JJ held (Jacobs J concurring) at [19]:

*A consideration of these situations confirms us in thinking that when the Act creates the offence of having possession of a dangerous drug or a prohibited plant, without adverting to quantity, it contemplates possession, not of a minute quantity incapable of discernment by the naked eye and detectable only by scientific means, but a possession of such a quantity as makes it reasonable to say as a matter of common sense and reality that it is the prohibited plant or drug of which the person is presently in possession. Even though the statute is aimed at a social evil, if it is ambiguous or silent upon a particular point it is permissible to construe the statutory provision so as to avoid an unfair or unjust result . . .*

## Mens Rea

Aickin J held at [13]:

*The solution of the problem of minute quantities appears to me to lie in the proper application of what is involved in the concept of "possession". It is necessary to bear in mind that in possession there is a necessary mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused.*

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<sup>1</sup> de minimis non curat lex (The law does not concern itself with trifles)

## De Minimis Principle

Lionel Murphy held that the conviction was bad based on both the De Minimis principle and the lack of mens rea. He held:

*[6] . . . The de minimis principle is also applied to avoid hysterical or oppressive law enforcement; cases in which a finding of guilt would tend to bring the law or the judicial system into ridicule or contempt because of triviality. This is such a case. . .*

*[7] . . . Knowledge by the person charged that he has the prohibited substance is not enough where the amount of material is so small or so dispersed or mixed up with other material that it cannot in practice be used in the way contemplated by the Act. . .*

## Representations

When confronted with such a case, counsel should make representations to the Police Area Commander requesting them to withdraw the charge. The representations should quote the above three passages from Williams and use all three defences:

1. the common sense and reality test,
2. lack of mens rea, and
3. the de minimis principle.

I am available every day should you require further assistance.

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