

# Theory of Liability Handbook

1st Edition

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# Introduction to the notion of Criminal Liability

The theory of Criminal Liability is the foundational pillar of the criminal justice system. Through this theory, it is determined when a person can be held legally responsible for acting outside the limits prescribed by law. It relates to the conditions that must exist in order for a person to be considered accountable, answerable and punished in terms of criminal law.

A person who commits a wrong is said to be liable or responsible for the wrongful act they have committed, a fact which holds true both in terms of civil and criminal wrongs. A criminal wrong is one which is directed against the State or the community and thus is considered to be public wrong. This is indicated through **Article 4** of Chapter 9 of the Laws of Malta, the Criminal Code, which notes that a criminal action is one which is public in nature vested in the State and prosecuted in the name of the Republic of Malta. On the other hand, civil wrongs are private in nature as they are directed against determinate private persons.

Through this handbook, we shall be regarding liability under a criminal lens, analysing the elements of this theory and how a person may be found liable in terms of criminal law.

## What is liability?

According to Black's Law Dictionary, legal liability refers to being "*responsible or answerable in law; legally obligated*". This relates to an existing bond of necessity between the wrong-doer and the remedy for the wrong they have performed. This legal bond is known as *vinculum juris*. According to Professor Mamo, this consists of those things which must be done or that the person must suffer through due to the person having failed to do that which they ought to have done.



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# Actus non facit reum, nisi mens sit rea

This translates to “*the act is not culpable unless the mind is guilty.*” From this Latin maxim of criminal law, the general conditions for criminal liability are outlined. Through it, we identify the fact that criminal liability cannot arise solely through the consummation of a criminal act or omission but must necessarily be accompanied by criminal intent. As a general rule, he who acts without the requisite guilty mind cannot be found liable in terms of criminal law - conduct doesn't make a man guilty unless his mind is guilty also.

Thus, there are two conditions which must be fulfilled in order for criminal liability or responsibility to be rightfully imposed:

- (1) The Material Condition of Liability
- (2) The Formal Condition of Liability

## The Material Condition of Liability

This is the condition of liability which relates to the criminal act itself. It is referred to as the *actus reus*. In this regard, an act is understood to refer to any event which is subject to the control of human will. This condition is indicative of the fact that a person may only be held responsible for that which they themselves do. It relates to the sum of material or physical circumstances prohibited at law performed by an act of man.

We distinguish between two types of acts, those being:

- a) Positive Acts
- b) Negative Acts

A positive act relates to acts of commission whereby a person does something which they ought not to do.

A negative act relates to acts of omission whereby a person doesn't do that which they ought to do.



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Moreover, we note that acts can also be either:

- Internal Acts
- External Acts

An internal act refers to an act of the mind. One such example would be thinking. We note that criminal law is not concerned with such internal acts and makes it so that no person can be found to be criminally liable for thoughts that are not accompanied and supported by an external act that indicates progress has been made in the direction of carrying out the internal will of the offender. It would be impossible to prosecute and prove to the degree that criminal law requires (proof beyond reasonable doubt) the intention to commit a crime when no tangible concrete action has been employed in furtherance of it. Moreover, expecting people to control their thoughts to this extent would go beyond the standard of care required of them.

Thus, internal acts alone are insufficient to enable the arising of criminal liability and must necessarily be accompanied by an external act for it to be construed as a crime for which liability can arise.

An external act relates to the act of the body. These overt acts are defined by the United States Supreme Court as being a *“physical activity or deed, indicating the intention to commit a particular crime, more than a mere planning or preparation, which if carried out to its complete termination following its natural course, without being frustrated by external obstacles nor by the spontaneous desistance of the perpetrator, will logically and necessarily ripen into a concrete offence.”*

In addition, in the case of **People v. Lizada, (24.01.2003)** it was established that *“the overt acts must have an immediate and necessary relation to the offence.”*

It is worth mentioning in relation to such acts, that for criminal liability to arise, it is necessary that the harm caused must be owing to the actions of the accused. This causal relationship is vital when establishing criminal liability. The test for this relationship between the conduct of the accused and the subsequent results is that the event would not have unfolded in the same manner without the direct participation of the offender.



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We note that every act is made up of its origin, circumstance and its consequences. Any act the law prohibits and proclaims as being wrongful is so prohibited with respect to all three elements - its origin, circumstance and consequence.

Here, we ought to pay special attention to the consequences of the act. With regards to the consequences of an act prohibited by law, we note that such consequences don't always necessarily need to be actual, but can be merely anticipated. This means that in the eyes of the law, an act is prohibited due to its actual results as well as its tendencies, even if the issue in itself is harmless. The logic behind this is as follows: "*If a person performs an act of this nature, they will be liable in all events, not solely if harm ensues*".

Having established what constitutes the material condition, it is important to note that fulfilling the material condition, which involves committing an act that is prohibited by law, is not enough to establish culpability if the formal condition is absent. In other words, the mere commission of an illegal act without satisfying all the formal requirements cannot be the basis for attributing liability.

## The Formal Condition of Liability

This is the condition of liability which relates to the intent or the guilty mind with which a criminal act is performed and is known as the *mens rea*. This formal wrong-doing of an individual depends on the state of mind and will of the actor performing the criminal offence.

The *mens rea* includes within it two distinct mental attitudes:

- (1) Intention whereby the wrongful act was purposefully done because it was intended by the doer.
- (2) Culpable negligence whereby the wrongful act was done because the doer lacked the sufficient care necessary to ensure that it did not occur.



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The first falls within the realm of *dolo* and the latter within the realm of *culpa*. According to Carrara, *dolo* was defined as “the more or less perfect intention of doing an act which is known to be contrary to law.”

Generally, a person can only be found criminally responsible for those wrongs which he performs either intentionally or negligently. Only when an act or omission is performed either intentionally or negligently can it be argued that the *actus reus* is accompanied by the *mens rea* and therefore, only in such scenarios can a person be found criminally responsible.

This examination leads to the conclusion that the conditions necessary in order for criminal liability to arise, namely the material and the formal, are cumulative. In the vast majority of cases, both elements must be present in order to render an accused criminally liable for their actions.

Therefore, as noted, the satisfaction of the material condition through the carrying out of an act that is prohibited by law cannot be considered grounds for culpability should it not be accompanied by the formal condition of a guilty mind. Likewise, the contemplation of an act or omission repressed by way of the penal system, thereby satisfying the formal condition, without satisfying the material condition, also cannot give rise to criminal responsibility.

The exceptions to the rule whereby the *actus reus* alone is sufficient for criminal liability to arise irrespective of the presence of the *mens rea* are offences of absolute liability or offences of strict liability as was explained by Salmond. The primary examples of such offences are contraventions whereby criminal liability arises through proof of the act's commission itself thereby eliminating the need to prove a guilty mind. Such offences will be discussed in greater detail at a later stage.

Regarding the rationale behind the punishments imposed for the two distinct mental states, if an individual is found to have intentionally committed a wrongful act, the punishment is designed to serve as a deterrent against future wrongdoing. Conversely, if an individual is found to have committed a wrongful act due to a lack of sufficient care in avoiding it, the punishment is intended to encourage greater vigilance and carefulness in the future.



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# The Types of Offences arising out of the *Mens Rea*

We note that owing to the different distinct mental attitudes, there are three offences that can follow as a result of the requirement of a *mens rea*. These relate to:

(1) Intentional or Wilful Offences whereby the *mens rea* amounts to intention and purpose. According to Professor Mamo, intention refers to the purpose or design with which an act is done. This is generally understood as being the combined operation of the intellect and will whereby the striving of the will towards a certain end is represented as desirable by the intellect. An act is deemed to be intentional when it corresponds to the idea which was present in the actor's mind.

(2) Offences of Negligence whereby the *mens rea* amounts to negligence and a lack of observance of the standard of care required;

(3) Offences of Absolute Liability where the *mens rea* is not required. In these cases, neither wrongful intent nor culpable negligence are conditions of responsibility.



# Direct and Indirect Intent and the Theory of Carrara

According to Carrara, it was argued that intent is direct when “*the effects of one’s actions are foreseen and desired and when one’s actions are carried out in such a way that the desired consequences of that act in fact ensue.*”

This is deemed to be equivalent to *dolo* which as we have described concerns actions that occurred when the wrongful act was purposefully done because it was intended by the doer. It ought to be noted in this regard that if the means used to bring about the desired consequences can only probably achieve that purpose, the intent doesn’t stop being direct. It simply means that the mode used to carry out the act was liable to miscarry.

On the other hand, intent is indirect when “*the results of one’s actions is merely a possible consequence when this consequence was either:*”

- not foreseen at all; or
- if it was foreseen, it was not desired”

Owing to this explanation, we can further sub-divide indirect intent into: positive and negative indirect intent.

## Positive Indirect Intent

Positive indirect intent relates to the scenario where the consequences of a person’s actions were foreseen and, notwithstanding such foresight, the means used were desired, even if the end event was not desired. This is tantamount to *dolo*.

## Negative Indirect Intent

Negative indirect intent relates to the scenario where the possible consequences of one’s actions were both underside and unforeseen. This means it relates to either *culpa* (negligence) or *casus* (pure accident which doesn’t give rise to criminal liability).



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# The differences that exist between Positive and Negative Indirect Intent

Distinguishing between the two types of indirect intent can be a challenging task, often requiring legal professionals to make a determination based on the specific circumstances of the case. Despite the difficulty in making this distinction, it is a crucial one that carries significant implications in both theory and practice. Specifically, the determination of whether one is in the realm of *dolo* or *culpa* can significantly impact the extent of criminal liability, and in some cases, even determine if such liability exists at all. Additionally, the difference between these two forms of indirect intent is reflected in the punishment that is assigned.

According to the case **Ir-Repubblika ta' Malta v. Pascalino Cefai (08.10.2015)** *"intent is indirect when the event is simply a possible consequence of the actus reus which event either was not foreseen or was foreseen but not desired. If such consequences were foreseen and notwithstanding that the actus reus was desired and voluntary, the consequences were not desired, the intent is positive indirect. If however, the consequences were not desired and not foreseen, the intent is negative indirect. Direct intent and positive indirect intent give rise to dolus which requires power of volition, knowledge and foresight. Negative indirect intent gives rise to culpa, culpable negligence, or to casus, accident."*

## Dolo - Direct Intent & Positive Direct Intent

As noted, Carrara defines *dolo* as *"the more or less perfect intention of doing an act which is known to be contrary to law."* Thus, in order for an offence to be deemed to have a direct intent or a positive direct intent, it is essential that the agent is aware that their actions are wrong and are injurious to the rights of others protected by criminal law.



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According to Kenny, this intent requires:

- (1) Volition, i.e. the actor must be able to choose to not commit a crime;
- (2) Knowledge within the actor that their actions are wrong;
- (3) Foresight of such circumstances.

To establish that an act was performed maliciously (*dolosamente*), both foresight and desire are necessary. However, some contend that this requirement creates significant challenges for the prosecution in proving such a complex mental state, which may ultimately preclude the imposition of criminal liability.

This difficulty can be resolved through acknowledgement of the maxim *dolus indeterminatus determinatus ab exitu* whereby a person is presumed to intend the obvious and natural consequences of his voluntary acts.

In most cases, the law regards the criminal act in itself as being sufficient *prima facie* proof of the existence of criminal intent since the known consequences of an illegal act are imputed by the law as intentional. In addition, the law treats as intentional all consequences which the actor foresees as the probable results of his wrongful act.

The presumption that the law regards the criminal act itself as sufficient *prima facie* proof of the existence of criminal intent, is a *juris tantum* presumption. This means it can be rebutted if the accused is able to demonstrate that:

- The consequences which have arisen through the physically inevitable were not an obvious result of his actions; or that
- The result which occurred was probable only when certain circumstances co-existed and he was not aware of the existence of the circumstances; or that
- At the time the actor committed the act, he was not capable of forming an intention and was thus, *doli incapax*. This a legal term that means "incapable of wrongdoing" in Latin. It refers to the presumption that children under a certain age lack the ability to understand the nature and consequences of their actions, and therefore cannot form the necessary *mens rea* to be held criminally liable for their actions.



However, if someone can successfully rebut this presumption, it means that they cannot be held accountable for maliciously intending the results of their actions.

Keep in mind that according to Carrara, it is important to note that wrongful intent does not necessarily have to be present at the time of the final act of completing the crime. This is because there are situations where the causative act and the actual completion of the crime are separated by a significant period of time or involve the actions of a third party. Thus, a person cannot escape responsibility for their wrongful intent that accompanies the causative act.

## The difference between 'intent' and 'motive' and the notion of 'premeditation'

It is important to distinguish between the motive and the intent behind an offence as they are two separate concepts. The motive refers to the underlying reason for committing a crime and the ulterior object that the wrongdoer desires to obtain through their actions. On the other hand, the intent relates to the will directing an overt act and is required by law for an offence to occur. It is crucial to note that while the prosecution must prove the *mens rea*, they do not need to prove the motive driving the offence.

While there are a few offences where the nature of the crime makes the motive relevant as it defines the crime, examples include illegal arrest and abduction, it is not the norm. It is worth noting that in most cases, the motive is juridically irrelevant except in these very specific situations, and it is not a necessary condition for criminal liability to arise. Hence, the desired purpose behind the criminal actions of the actor is extraneous to the notion of intent.

With reference to premeditation we once again see that similarly to the motive behind a crime, premeditation is not juridically relevant as there is no need for the agent to have formed the intent at an established time prior to the commission of the offence. The crime will subsist if the intent was formed in the spur of the moment before the offence was committed. However, this notion will likely influence the punishment handed down by the Courts.



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# Types of Criminal Intent

## Generic v. Specific Intent

Generic intent refers to the situation where an individual intends to perform an illegal act without any specific motive or purpose behind it. This relates to *animus nocendi*, which is the subjective state of mind of the actor regarding the illegal content of their actions and their potential consequences. This mental element is necessary and, as a general rule, sufficient for criminal liability to arise. The maxim *dolos indeterminatus determinatur ab exitu* is also relevant here, which means that the generic intent to cause harm is determined by the outcome and consequences of the action.

On the other hand, specific intent refers to the situation where the offender intends to commit an offence where the requisite intent is prescribed by the law itself within the definition of the crime. For instance, the offence of willful homicide requires the specific intent to kill or put a person's life in manifest jeopardy - *animus necandi*. Without this specific intent, the accused cannot be found guilty of willful homicide.

An example highlighting the difference between the two can be seen when comparing the offences of willful homicide and bodily harm. Willful homicide requires specific intent to harm or put another person's life in manifest jeopardy, whereas in bodily harm, the generic intent to cause harm is sufficient for criminal liability to arise, proportionate to the extent of harm caused as a result of the offender's actions.

## Determinate v. Indeterminate Intent

When discussing this distinction, we note that determinate intent arises when the crime committed by the offender relates exactly to the crime the offender wished to commit. On the other hand, indeterminate intent arises when an offender, wishing to perform a certain wrongful action, performs it not taking into consideration that a more grave outcome may arise as a result of that action.



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An example of this is the following: Person A wishes to stab Person B with the intent to harm him but is aware of the possibility that a more grave outcome could ensue. This distinction is one which in practice doesn't carry any importance because an indeterminate intent has the same capacity to enable liability as determinate intent.

## Mens Rea and the Criminal Code

The principle '*actus non fact reum, nisi mens sit rea*' applies as a general rule throughout criminal legislation regardless of whether the legislator makes specific reference to the intent when defining the crime. This must be noted since not all crimes outlined in the Criminal Code make specific reference to the requisite criminal intent required in order for the *mens rea* to be satisfied.

However, this lack of explicit reference doesn't mean it is not applicable or required. When the legislator doesn't make use of any reference to the criminal intent in the definition of a crime, it is because the act itself *prima facie* indicates deliberate wrongfulness. In such cases, the formal condition is clear and the *mens rea* can be inferred.

## Criminal Negligence - Negative Indirect Intent

Negligence, commonly referred to as *culpa*, is liability which arises from negligent wrongdoing. In such cases, the offences are involuntary meaning the individual did not foresee the consequences of his actions even though they were foreseeable. This is the definition of *culpa* presented by Carrara.

Here, the individual who committed the offence had no will to cause the consequences of his actions. According to Carrara, direct negative intent which gives rise to *culpa* necessitates that the person performing the action did not desire the harmful result nor foresaw it and therefore, this extinguishes the possibility of *dolus* existing.



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The *mens rea* of an offence involving negligence, or *culpa*, can arise when there is an absence of foresight despite foreseeability, a lack of desire for the consequences, and a direct causal link between the action and the effect. Without this causal link, there can be no criminal liability. If the causal link is present, however, *culpa* becomes the *mens rea* and can lead to criminal liability when occurring simultaneously with the *actus reus*.

Here, we can consider two approaches to *culpa*, namely the Subjective and Objective Approach.

## The Subjective Approach

The subjective approach to *culpa* considers it as a mental state of the person. It occurs when the person fails to be attentive, and the wrongdoing would have been avoided if they had not been mentally indolent. Therefore, according to this approach, a person's negligence lies in their failure to anticipate what should have been anticipated. To determine whether a consequence is foreseeable, the court examines the person's state of mind at the time of the material act and determines whether they should have been able to anticipate the consequences of their actions.

## The Objective Approach

The objective approach to negligence considers it to be an act rather than a state of mind. It asserts that individuals who fail to act with reasonable diligence are already breaching their duty of care, rendering the question of whether the event could have been foreseen or avoided is irrelevant. However, the conduct must still have a direct causal connection with the harmful result. Many writers disagree with this approach because analyzing the state of mind is essential in distinguishing between accidental and intentional wrongdoing.

## The Resulting Standard of Care Required

In this regard, it is important to consider how the Court may determine whether something is foreseeable. The Maltese Courts only consider consequences which are foreseeable by an ordinary, prudent and reasonable man.



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The law imposes a duty of care on individuals to act with the level of diligence expected of a *bonus paterfamilias*. This does not mean that the law expects individuals to act with extraordinary diligence, but rather to adopt a standard of care that a reasonable and prudent person would take in the same circumstances. As mentioned, the level of care required is that of an ordinary, prudent, and reasonable person, which means that the law does not expect every possible outcome to be foreseeable, but only those which are reasonable.

According to Carrara, individuals must exercise due diligence to be able to foresee the consequences of their actions and prevent violations of the law. Thus, culpability arises when an individual voluntarily omits to exercise due diligence and, as a result, fails to foresee a foreseeable consequence that would have been prevented had they exercised the required level of care. In Maltese law, this means that a person who breaches their duty of care and causes harm to another may be held liable for negligence.

## Negligence under the Maltese Civil Code

Most modern Criminal Codes, including Malta's, don't give a concrete definition of negligence. However, our Criminal Code lays out a blueprint for the notion of negligence in **Articles 225** and **328**. That which is contained therein strongly resembles the definition provided by Manzini namely that *culpa* consists of "*negligenza, imprudenza o imperizia professionale*", i.e. negligence, imprudence or professional unskillfulness on the part of the accused.

Contrastingly the wording of Maltese law reads as follows:

*"Whosoever, through imprudence, negligence or unskillfulness in his trade or profession, or through non-observance of any regulation..."*

Thus, negligence can be seen as twofold.

Firstly, negligence can arise through imprudence, negligence, or unskillfulness through one's trade or profession. In **Pulizija vs Saverina sive Rini Borg (31.07.1998)** the Court of Appeal defined these terms in its judgement:



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*"Imprudence arises from someone's behaviour when such a person doesn't apply or exercise the appropriate causation. Carelessness arises from the lack of attention and concentration of the agent. Unskillfulness is the specific form of professional negligence."*

Negligence also arises through the non-observance of any laws, regulations, and orders. Any person who fails to abide by such regulations will be deemed to have acted negligently and will be responsible for any involuntary offence committed as a result of this negligence.

In fact, in the aforementioned case the Court stated that *"Negligence can also arise from the failure to obey and adhere to laws, regulations and orders as those many regulations stipulated by public authorities in relation to an identifiable activity with the purpose of avoiding harmful effects and damages to these parties. That is, those which prevent harmful effects, for example, the Dangerous Drugs Ordinance."*

However, every form of negligence contains one indispensable element which is foreseeability. Therefore, foreseeability is an essential requisite for negligence to arise. The type of negligence depends on the different degrees in which the foreseeability partakes. In essence, our Criminal Code requires that for criminal liability to arise, the harm caused by the the perpetrator should have been foreseeable by the defendant.

## Degrees of Negligence

Civil law divides negligence into different possible degrees:

1) *Culpa Levissima* - these are outcomes which are only foreseen by people who act with extraordinary diligence.

2) *Culpa Levis In Concreto* - slight negligence occasioned by a lack of diligence that a person would have used for the care of his own affairs;

3) *Culpa Levis In Abstracto* - slight negligence occasioned by a lack of *diligens paterfamilias* - the ordinary standard of care exhibited by a prudent person.



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4) *Culpa Lata* - this refers to gross negligence. These are outcomes which could have been foreseen by all men.

One would not be found criminally liable under the first seeing as it exceeds that which is required by an ordinary, reasonable man. Understandably so, the punishment awarded would be higher if one were to be grossly negligent. This distinction is not used for the practical application of criminal law as the only consideration made is whether there exists negligence or not.

## Contributory Negligence

Victims who have contributed towards the outcome of the accused's act are also liable for the offence as the accused. This does not mean that contributory negligence avails the accused. It is recognised as a partial defence that can be raised in civil cases where the plaintiff is seeking damages for harm suffered. The Court will assess the degree to which the plaintiff's own negligence contributed to the harm suffered, and reduce the damages awarded proportionally.

As stated in **Pulizija v. Baskal Saliba (28.07.2017)** "*the criminal liability of the accused remains the same although it can be considered for the purposes of the punishment inflicted.*"

Moreover, in the case of **Pulizija v. Carmen Abela (02.02.2011)** it was argued that "*in criminal proceedings, the contributory negligence of the victim does not absolve the person causing the damage, bodily harm or death from criminal responsibility unless it is the only cause of the accident. However, it may be taken into account for the purpose of punishment.*"

Similarly, the victim's consent for a negligent act does not eliminate criminal responsibility. Negligence is found through an analysis of the relationship between the agent and their state of mind, thus, the victim's consent is irrelevant with regard to negligence.



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# Casus

In Maltese law, *casus* is a Latin term that refers to an unexpected or unforeseeable event that is beyond the control of the parties involved. In the context of liability, *casus* is an event that is not caused by the fault or negligence of the person *who* is being held responsible for the harm or damage caused.

The theory of liability in Maltese law is based on the principle of fault or *culpa*, which, as noted, means that a person is only liable for harm caused if they have been negligent or acted with intent. Therefore, if the harm was caused by a *casus* or an event beyond the person's control, they cannot be held liable as they did not act with fault.

Therefore, in situations where the consequences of an individual's actions are not willed, not foreseen and are most importantly unforeseeable, there is no criminal intent which can arise seeing as this relates to pure accident and results in no criminal action.

## Offences of Absolute Liability

These are offences for which a man is criminally responsible irrespective of any wrongful intent or negligence. Therefore, this is an exception to the rule *actus non facit reum nisi mens sit rea*.

Usually, these exceptions arise when:

1. Small penalties are given as punishment, such as small fines;
2. The damage caused by the public offence is great in comparison with the penalty;
3. Evidence concerning the ordinary *mens rea* is difficult to acquire

This means that no ignorance or mistake of fact can afford any justification nor excuse for the commission of these offences. Strict liability applies to these offences meaning prosecution is not required and the defendant can be found guilty regardless of whether or not they intended to commit the offence or were aware of the circumstances that led to the offence.



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Some examples of offences of absolute liability under Maltese law include traffic offences, such as speeding or driving without a valid license, and certain environmental offences, such as pollution or waste disposal offences.



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