PLEASE NOTE THAT THE GUIDELINE ANSWERS TO PREVIOUS PAPERS MAY NOT BE A CORRECT REFLECTION OF THE LAW AND/OR PRACTICE AT THE MOMENT OF READING.

NOTE TO EXAMINER: This guideline records the views of the drafters. There may be justifiable variations in practice which are brought out in the answers. When this happens the examiner should apply his discretion in marking the answer.

QUESTION 1

1.1 Hospital expenses (1/2) 
Medical expenses (1/2) 
Loss of income (1/2) 
General damages (1/2) 
or 
Non-pecuniary loss (ie general damages) (1) 
Pecuniary loss (1) (2)

1.2 No. In terms of the Act the Plaintiff’s claim has no limitations in respect of either the quantum or the head of damages that can be claimed. (2) 

[Note to examiner: The limitations on all passenger claims were removed by the amendments to the Act]

1.3 Yes. Client would not be entitled to claim general (non-pecuniary) damages. (2)

1.4 Yes. He has a claim for the loss of dentures, hearing aid and camera (ie material damages) (2)

[Note to examiner: He has no other common law claim against the driver due to the fact that under the amended Act there is no longer any restriction on the Fund’s liability to compensate passengers for the damages they suffer]
1.5 The Fund could apply an apportionment against the claimant for having causally contributed to certain of his injuries by not wearing a seatbelt.

1.6 The documents to be submitted are the RAF1 and RAF4 claim forms.

They must either be delivered by hand or sent by pre-paid registered post.

QUESTION 2

No. You cannot recover either. In terms of the Act only party and party costs incurred after summons is issued can be recovered. Interest is only recoverable from a date fourteen days after a Court judgement.

QUESTION 3

3.1 In her personal capacity she can claim the medical and hospital expenses incurred.

In her representative capacity she can claim the general damages, future medical expenses and loss of earnings.

3.2 Before the expiry of a period of two years from the date of collision she must deliver the RAF1 and RAF4 claim forms. Because this is a hit and run accident both forms must be so delivered to avoid prescription.

3.3 She has no claim as she only suffered emotional shock as a result of the accident.

[Note to examiner: Any reference to no claim for emotional shock should give the candidate credit because a claim of this nature was specifically removed by the amendment.]

QUESTION 4

Note to the examiner:

Award ½ a mark for every mistake identified and ½ a mark for the motivation supplied. Mark the first 10 mistakes so identified.

1 A simple summons
A simple summons may only be used for claims for payment of a debt, delivery of specified movables, transfer of fixed property, cancellation of an agreement or eviction – not for damages, where the combined summons must be used.

2 Lack of jurisdiction
The North Gauteng High Court does not have jurisdiction as the defendant resides in Cape Town and the cause of action arose in Durban.
3 Reference to respondent wrong
In action procedure the parties are referred to as plaintiff and defendant.

4 Plaintiff’s citation incomplete
The rules require full names, gender, occupation and address of the plaintiff.

5 Lack of locus standi
An unemancipated minor is suing without being assisted by a parent or guardian or curator ad litem.

6 The summons fails to disclose a cause of action
There is no mention of fault, i.e. vehicle having been driven negligently.

7 No locus standi of the plaintiff
(No interest in the subject matter of the litigation). The summons should allege that the plaintiff was the owner of the vehicle alternatively that the risk of damages/loss had passed to the plaintiff.

8 Lack of locus standi of the defendant
The fact that the defendant is owner of the vehicle is irrelevant – it should be alleged that he was the driver of the vehicle.

9 Wrong interest rate claimed
The mora interest rate is 15.5% not 18.5%.

10 Date from which interest charged wrong
Interest should be charged either from date of service of summons or date set as date for payment in a prior letter of demand – not from the date of the collision.

11 Attorney and client costs wrong
There is no basis for claiming costs on attorney and client scale. This is only allowed as a result of an agreement between the parties or as punitive measure by court.

12 (Dies) 5 days allowed to enter appearance to defend is wrong
The defendant residing outside the area of jurisdiction of the court should be allowed 21 days to enter appearance to defend (Cape Town more than 160 kilometers from seat of court (Pretoria).

13 Damages not properly quantified
Rule 18(10) stipulates that damage should be set out in such a way that the other party (defendant) must be able to reasonably assess the quantum thereof.
QUESTION 5

5.1 Apply to court for an order that plaintiff pay the costs of the action as well as costs of the application. (1)

5.2 Within 20 court days from date of receiving of the notice of withdrawal. (1)

5.3 "Take note that application will be made on behalf of the above named applicant on (date) and (time) or as soon thereafter as applicant’s legal representative may be heard for an order in the following terms:

2.3.1 Plaintiff pays the costs of the withdrawn action. (1/2)
2.3.2 Plaintiff pays the costs of this application. (1/2)

Further take note that the affidavit of .................... will be used in support of the application. (1/2)

Kindly enroll the matter accordingly. (1/2)

Defendant’s attorney

To Registrar of Court

And to Plaintiff’s attorney

QUESTION 6

6.1 In addition to following the domicile of the defendant section 2(1) of the Divorce Act of 1979 also affords jurisdiction to a court where on date of institution of the Divorce action, any of the parties is ordinarily resident within the area of the said court as well as ordinarily resident in the Republic of South African for a period of not less than one year immediately prior to the date on which the action is instituted. KZN Division of the High Court, Durban would thus have jurisdiction. Pietermaritzburg will have concurrent jurisdiction. (3)

6.2 An application to court for leave to sue by way of edictal citation. (1)

6.3 The short form. (1)

6.4 For an order in the following terms:

6.4.1 That leave be granted to the applicant to institute proceedings against the respondent by way of edictal citation, in which proceedings the applicant claims a decree of divorce and certain other relief. (1)

6.4.2 That the citation be served on the respondent personally. (1)
6.4.3 That the respondent be informed in the citation that if he wishes to defend the action he must give notice to the registrar of this honourable court and to applicant's attorneys of his intention to do so within 1 (one) month of the date on which the citation is served on him. (2)

6.4.4 That the costs of this application will be costs in the cause of the action. (1)

6.4.5 Alternative relief.

QUESTION 7

7.1 Not guilty. Oblige the State to prove its case. However you may not put a version which conflicts with your instructions. You may only test the reliability of the State's case.

Enter a plea of guilty (3)

7.2 Withdraw from acting for that client on the ethical basis of receiving conflicting instructions and an attorney's obligation not to mislead the court. (2)

7.3 Utilise the provisions of section 105A of the Criminal Procedure Act

DIRECTIVE TO EXAMINER: Allocate one mark to the above answer and half a mark in respect of each of the under mentioned. Also note that candidates have been requested to briefly set out the procedure.

Conclude a written plea agreement between the State's authorized representative, the accused representative and the accused.

The prosecutrix must disclose to the court, prior to the accused being required to plead, that such an agreement has been entered into.

The court will question the accused to confirm that such an agreement has been entered into and satisfy itself that the investigating officer has been consulted with regard to the agreement and that the complainants have had the opportunity to make representations as regards the agreement. (i.e. Sec 105 A sub sec 1(b) i and iii).

If the court is satisfied that the agreement complies with the above requirements then it shall require that the accused plead to the charge and order that the agreement be disclosed in court.
The court will then question the accused to ascertain whether he confirms the terms of the agreement and the admissions made, that the accused admits the allegations in the charge to which she has agreed to plead guilty and that the accused entered into the plea agreement freely and voluntarily, in his sound and sober senses and without having been unduly influenced.

If after its enquiry, the court is of the view that the accused is not guilty of the offence for whatever reason it shall enter a plea of not guilty and advise the prosecutor and accused accordingly.

If a plea of not guilty is entered then the proceedings shall commence de novo before another presiding official.

If the court is satisfied that the accused admits all the material allegations in the charge and that the accused is guilty of the offence then it shall proceed to consider the sentence agreement by questioning the prosecutrix, the accused and, if necessary hear evidence of the accused and / or the complainant.

If the court considers the sentence to be just then it shall convict and sentence the accused in accordance with the sentence agreement.

Should the court consider the sentence in the agreement not to be just it shall inform the prosecutrix and the accused what sentence it considers just.

Both the prosecutrix and the accused may elect to abide by the sentence suggested by the court. If so, the court may proceed and convict the accused in accordance with the sentence the court considered just.

The prosecutrix or the accused may not accept the court's proposed sentence and withdraw from the agreement in which event the trial shall start de novo before another presiding officer. The agreement will be regarded as null and void and no reference will be made to it in subsequent proceedings.

(6)

**QUESTION 8**

8.1 Exceptional circumstances exist which in the interests of justice permit his or her release. Sec 60 (11A)

8.2 By leading viva voce evidence by the accused or by way of an affidavit signed by the accused.
8.3 No. The client has the right of silence which extends to evidence in a bail application. I would object to the questioning on the basis that the client must first be warned of his right to silence before electing whether or not to answer the question. (2)

8.4 Yes. In circumstances where the accused elects to testify he or she must first be warned by the court that anything he or she says may be used against him or her at his or her trial and that such evidence becomes admissible in any subsequent proceedings. (2)

8.5 Yes (1)

QUESTION 9

IN THE MAGISTRATES' COURT FOR THE REGIONAL DIVISION OF GAUTENG HELD AT PRETORIA

CASE NUMBER: 145/2010

In the matter between:

THE ACCUSED

APPLICANT

and

THE STATE

RESPONDENT

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE THAT the Applicant hereby gives notice of his intention to apply for leave to appeal to the Gauteng Division of the High Court of South Africa against the sentence imposed upon him by the Regional Magistrate, Mr J Jones sitting in Regional Court 3 on the 15th of July 2010.

The grounds of appeal are as follows:

1. The sentence imposed upon the Applicant induces a sense of shock;
2. The Learned Magistrate failed to take into consideration the personal circumstances of the applicant and in particular that he is young, a first offender and a student;
3. The Magistrate erred in not taking into consideration the circumstances under which the offence was committed and that the goods were recovered;
4. The court erred in not attaching sufficient weight to the correctional supervision report in that had it done so it would have imposed one of the following non penal sentences:

a. A fine;
b. A period of imprisonment wholly suspended subject to conditions;
c. A fine coupled with a period of suspension, suspended in its entirety;
d. Periodical imprisonment;
e. Correctional supervision.

5. The Learned Magistrate over-emphasized the seriousness of the offence and the interest of the community/society

6. Etc, etc.

DATED AT PRETORIA ON THIS THE 15TH OF JULY 2010

--------------------------------------------
APPLICANT'S ATTORNEY

TO: THE CLERK OF THE COURT
PREORIA

AND TO: THE PROSECUTOR
REGIONAL COURT 3
PRETORIA

QUESTION 10

PARTICULARS OF CLAIM

1. The Plaintiff is ________________  (1/4)

2. The Defendant is ________________  (1/4)

3. Plaintiff contracted with Defendant to build a garage at ________________ for the sum of R80 000.  (1/2)
4. Plaintiff paid Defendant R50 000. (1/2)

5. Defendant abandoned the contract with the garage partially completed. (1/2)

6. The reasonable costs of completion of the garage was R50 000. (1/2)

7. Despite demand Defendant has failed to pay.

WHEREFORE: Plaintiff prays for judgment against defendant for payment of the sum of:

a) R20 000; (2)

b) Interest a tempora morae; (1/4)

c) Costs of suit. (1/4)

QUESTION 11

The new rules do not allow a request for further particulars. Plaintiff may apply for summary judgment and must now file a declaration.

(Note: Examiners may have to be lenient)

QUESTION 12

12.1 I would grant provisional sentence as the Magistrates does not know from the documents whose evidence to accept. Accordingly the defendant has failed to show a defence which is more likely to succeed than the Plaintiff's claim and as Defendant admitted signing the cheque, provisional sentence must be granted. (3)

12.2 The Defendant must tender to pay, within two months, to the Plaintiff (not pay into court) the claim and costs but he can (and should) ask the plaintiff to provide security for repayment of the amount. Defendant then files his plea. If Plaintiff does not provide security within two months, Defendant is excused from paying. (4)
QUESTION 13

13.1 You abandon R20 000

13.2 R90 000

13.3 Affidavit

I, XY, do make oath and say I am employed by/ 1. ____________________, assessor and reside at XX.

2. I am an insurance assessor and have 20 years experience in assessing the cost of vehicle repairs.

3. I examined the vehicle concerned herein and damage incurred in the collision were the boot of the vehicle was bent and it will cost R30 000 to repair.

4. I consider this sum to be fair and reasonable.

5. The pre-accident value of the vehicle is R100 000.

TOTAL: [100]