cinemas of the Caligula film and the proliferation of video rental outlets catering to "adult" tastes.

2. It is not enough for the Tribunal to say, as it has said frequently, that because material is "grossly explicit" or "patently offensive" or "concentrates on explicit depictions of genitalia" or is "lewd", "prurient", "salacious", "gross", or "obscene" that it is therefore injurious to the public good. This is a quantum leap which requires reasoned argument and empirical demonstration. It has been rare for the Tribunal to attempt such reasoning. There is no such attempt at reasoning in the "tripartite test" cases. With reference to the "lewdness or prurience" approach, no such reasoning is possible. There has never yet been an adequate answer to the question why material concentrating on genitalia, contrived sexual poses and non-violent explicit sexual intimacy between adults, should necessarily be injurious to the public good even when restricted to adult readers in limited numbers at a substantial price. None of the Tribunal decisions which have applied the tripartite test attempt any reasoning for a finding of injuriousness other than that there has been a breach of one element only of such 3 element test. Counsel's argument to the Tribunal on previous occasions (acknowledged in decisions 66/89, 67/89, 87/89 and others) has been that a breach of one limb only of the "tripartite test" should not alone result in a finding of unconditional indecency. The "tripartite test" as historically framed and as precedently applied in its various forms, whether cumulatively or limb-by-limb, is now a dead letter and should be abandoned.

3. The High Court (*Gordon & Gotch*) has said that if the Tribunal has evidence before it, it may act upon it, but in the absence of specific evidence it is entitled to draw on its collective experience. It must be emphasised, however, that this approach does not authorise the substitution of personal options or preferences of members of the Tribunal. Where the Tribunal acts on its collective professional expertise, it must be satisfied that such expertise does itself provide the causative link between the material complained of and the discernible injury to be proved.

4. The Morris Report, which was delivered in January 1989, was not able to conclude that non-violent pornography was causative of injury to the public good. Having reviewed a variety of submissions (some conflicting) about the effects of non-violent pornography it concluded that "the effects of non-aggressive yet degrading pornography are not yet well studied".

5. While recognising that the *Everard* decision was concerned with interpretation of the Films Act 1983, the approach taken by McGechan J must be particularly persuasive for the Indecent Publications Tribunal in view of the learned Judges' extensive review of the earlier Court decisions (particularly *Lawrence* and *Gordon & Gotch*) and of the proper approach to be taken by a censorship body applying its governing legislation. At page 60 the learned Judge said there must be identification of:

> "... mandatory criterion of likely injury to the public good. Nothing else will do. There must be a *likelihood*, not a mere 'perhaps'. The likelihood must be one of 'injury'. Mere neutrality is no offence: It is not an objection that nothing good is achieved. The injury must be likely to be 'discernible' or 'actual', not in a requirement for proof, but in a quantum sense."

The Tribunal must consider the material in each publication before it anew having regard to such evidence as is offered and, in the absence of evidence, relying upon its own collective professional expertise.

6. It has been established, from the sources and authorities referred to in this submission:

(a) That there is no justification for classification of any of these magazines as indecent simply because they may be said to contain elements deemed objectionable by the "tripartite test".

(b) That no conclusive evidence has been accepted by any of the most recent public inquiries in Britain, Canada, the United States and in New Zealand (or at this hearing) that non-violent, non-coercive, explicit depictions of sexual activity between adults cause injury to the public good.

(c) That in the face of such public inquiries, reflecting as they must the most current statement of standards of community tolerance, the Tribunal cannot impose its own intuitive views as to what is likely to be injurious, by reference to precedent or otherwise.

(d) That unless there is before the Tribunal conclusive evidence that the material in the *Penthouse (U.S.)* issues before the Tribunal is likely to cause discernible injury to the public of New Zealand (which injury will not be cured or lessened by the factors in section 11) it cannot classify them unconditionally indecent.

*Submissions of Counsel for the Crown*

It is not necessary to provide a summary of the detailed, thorough and extremely helpful submissions made by Ms Goddard throughout the course of this decision to some of the submissions advanced by Crown counsel. The Crown submissions dealing with the Bill of Rights Act were particularly helpful and will be discussed later in this decision.

*Submissions of Counsel for the Society*

Mr Ford's submissions relied heavily on the evidence of Dr Court which has been dealt with in some detail earlier. The following is merely a summary of Mr Ford's detailed written submissions:

1. It appears that every edition of *Penthouse (U.S.)* submitted to the Tribunal since at least June 1983 has been classified as unconditionally indecent. An analysis of the decisions reveals that the magazine has steadily deteriorated over the last decade.

2. In past decisions the Tribunal has noted the decline in standards of the magazine, its lack of honesty of purpose, the need to either increase the serious articles or reduce or change the nature of the pictorial sections and finally, the lack of any improvement in the format of the magazine. Having regard to these observations the Society would have thought that the publisher would have applied for a reclassification only if it was able to demonstrate that the format or content had changed in some significant way from the format or content of the publications which had been before the Tribunal on previous occasions. The publisher had not taken that approach.

3. Although *Gordon & Gotch* approved the use of the tripartite test as a broad guideline by the Tribunal, it is clear from that decision and others that the Tribunal must always make its decisions in the end having proper regard to the statutory criteria..

4. There is no onus on any of the parties (in the context of this case, the Crown or the Society) to present conclusive evidence of capacity for discernible injury or some actual harm (reference McGechan J en *Everard* at the foot of page 56).

5. The evidence given by Dr Court, as is the case with the other expert evidence tendered, and like the tripartite test itself, can act only as a guide to the Tribunal.

6. It would be open to the Tribunal to accept any of the reasons advanced by Dr Court as to why the publications would be injurious to the public good.

7. It would be open to the Tribunal to find that the publications in question are injurious to the public good because that would be an interpretation consistent with the rights and freedoms protected by section 19 (1) of the New Zealand Bill of Rights Act 1990 (the discrimination provision). Dr Court in his evidence provided ample examples of how the publications