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Weekly Criminal Law Review

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A Weekly Bulletin listing Decisions of Superior Courts of Australia covering criminal

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Executive Summary

Kapanadze v R (NSWCCA) - criminal law - sexual assault - tendency evidence - expert evidence - unresponsive answer - whether jury should have been discharged - whether sentence manifestly excessive - 'special circumstances' - appeal dismissed

DL v R (NSWCCA) - criminal law - murder - expert evidence - experiments conducted during course of trial - errors identified - denial of procedural fairness - whether prosecutor's address reversed onus of proof - application of proviso - compelling inference of guilt - appeal dismissed

Alkanaan v R (NSWCCA) - criminal law - murder - assessment of objective seriousness - relevance of applicant's mental health and moral culpability - aggravating factors - no errors identified - appeal dismissed

R v Jason Mark Grogan (NSWSC) - criminal law - manslaughter - sentence - aggravating factors - below mid-range - 9 years 6 months, NPP 6 years 6 months

DPP v Robinson (VSC) - criminal law - manslaughter - young offender - rehabilitation prosects not good - effective term of 10 years, NPP 6 years 6 months, imposed

DPP v Baea (VSC) - criminal law - murder-sentence - young offender - general deterrence required - sentenced to 22 years, NPP 17 years

The Queen v Liszczak & Phillips (VSC) - criminal law - sentence - joint criminal enterprise - shooting at police - sentencing factors identified - sentences imposed

RMD v The State of Western Australia (WASCA) - criminal law - propensity evidence - *Longman* direction - *Liberato* direction - admissibility of propensity and relationship evidence considered - authorities referred to - necessity for *Longman* & *Liberato* directions considered - no errors identified - appeal dismissed

The State of Western Australia v Herbert (WASC) - criminal law - insanity - defence - WA *Criminal Code* provisions considered and applied - relevance of alcohol/drug intoxication - defence of insanity not available to accused

R v Al-Harazi (No 6) (ACTSC) - criminal law - evidence in chief interviews - whether the Crown should be permitted to play 4 interviews when it only sought to rely on the last - where the witness contradicted himself in the interviews - legislative history consider - directions made

Summaries With Link (Five Minute Read)

Kapanadze v R [2017] NSWCCA 69
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, Walton & R A Hulme JJ
Criminal law - sexual assault - conviction appeal - appellant convicted of aggravated sexual assault (under 16) (s61J(1) *Crimes Act 1900* (NSW)); aggravated indecent assault (under 16) (s61M(2) *Crimes Act 1900*) & 2 counts of attempted sexual intercourse (under 16) (s61P/61J(1) *Crimes Act 1900*) - appellant sentenced to aggregate term of 9 years 4 months, NPP 7 years - the complainant, who was the daughter of the appellant's partner, was 14 at the time of the offending - she participated in 2 interviews with police which were played to the jury - the appellant denied the allegations - the Crown was permitted, over objection, to rely upon tendency evidence - the tendency relied upon was that the appellant had a sexual interest in the complainant and a tendency to act towards her in furtherance of that interest - the evidence relied upon by the Crown in support of the tendency concerned an incident said to have occurred in a shed when the complainant's mother had found her and the appellant in a compromising situation - during the trial, an expert called by the Crown gave an unresponsive answer in cross examination and on appeal it was argued that the jury should have been discharged - a further appeal issue concerned the necessity to give a *Markuleski* direction (*R v Markuleski* (2001) 52 NSWLR 82) - held: (1) tendency evidence - no objection being taken at trial, r4 *Criminal Appeal Rules* (NSW) applied and leave was required to rely upon this ground - referring to *Steve v Regina* ((2008) 189 A Crim R 68) the better view is that, subject to the overriding obligation to ensure a fair trial according to law, there is no obligation on a trial judge to reject evidence on his or her own motion when no objection is taken and the accused is legally represented (*R v FDP* (2008) 74 NSWLR 645, [16]) - evidence of what happened in the shed was evidence of an uncharged act and was part of the factual context which gave rise to the offending - this ground was not made out; (2) jury discharge - the unresponsive answer

introduced hearsay opinion as to the sexual practices of the mother and not of the complainant and invited speculation by the jury that the allegations of anal sex and attempted sex were more likely true, being sexual practices that the appellant engaged in with the mother - the question raised by this ground was whether the result of the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice (*Crofts v The Queen* (1996) 186 CLR 427, 441*; TO v R* [2017] NSWCCA 12, [152]) - the evidence was clearly prejudicial, but it was adduced as an unresponsive answer in cross examination and not in the Crown case - the trial judge gave the jury an unqualified direction to ignore the answer and it is trite that until the contrary is demonstrated it must be accepted that the jury accepted and faithfully applied that direction - ground not made out; (3) necessity for a *Markuleski* direction - the direction was given and no redirection was sought - ground not made out: (4) severity - appellant argued that sentence was manifestly excessive and that the judge erred in failing to find 'special circumstances' - concept of 'special circumstances' considered in *R v Simpson* (2001) 53 NSWLR 704 - in order to challenge the judge's decision, it was necessary to identify a *House v The King* error ((1936) 55 CLR 499) - no such error identified - ground not made out - appeal dismissed [Editor's note: Walton & R A Hulme JJ agreeing with Hoeben CJ at CL].

Kapanadze

DL v R [2017] NSWCCA 57
Court of Criminal Appeal of New South Wales
Leeming JA, Rothman & Wilson JJ
Criminal law - DL pleaded not guilty to the 2005 murder of Tania, a girl aged 15 - he was tried and convicted in 2008 and sentenced to a term of 22 years, NPP 17 years - at the time of the murder, DL was 16 - issues at trial concerned a dying declaration by Tania apparently identifying DL as her attacker and analysis of blood splatter found on DL's clothes - there was also eyewitness testimony apparently linking DL to the murder - in seeking to now appeal both the conviction and sentence, DL was required to address the operation of r4 *Criminal Appeal Rules* (NSW) and the delay in prosecuting the appeal since 2008 - *Muldrock v The Queen* (2011) 244 CLR 120 & *Kentwell v The Queen* (2014) 252 CLR 601 had both been decided in the intervening period - held: (1) the significance of the delay in prosecuting the appeal was to be considered in the context of the strength of the case sought to be advanced on appeal - (2) the expert opinion evidence on the blood splatter was provided by a police Crime Scene officer who also conducted additional experiments during the course of the trial - on appeal, fresh evidence was adduced by a defence expert on blood splatter which demonstrated that the police evidence was not soundly based in relation to directionality, angle of impact, perpendicularity & the assumption that there was a single source of blood - consequently, the conviction could not be safely maintained - further, because of the procedure adopted by the police officer in conducting the experiments during the trial, the defence had been denied the opportunity to properly cross examine him - considering r4, the court could not be satisfied that defence counsel had not been placed in an unfair position in relation to cross examining the officer - extension granted & ground made out - (3) the applicant argued that the Crown

Prosecutor had improperly asked rhetorical questions in her closing address reversing the onus of proof (see *Wood v R* (2012) 84 NSWLR 581, [605]-[606]) - the prosecutor had highlighted the implausibility of the defence case and had not reversed the onus of proof - ground not made out: (4) application of the proviso - applicable legal principles identified at [106]-[114] - authorities referred to (*Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; *Lindsay v The Queen* (2015) 155 CLR 272; *Filippou v The Queen* (2015) 256 CLR 47; *Weiss v The Queen* (2005) 224 CLR 300) - after considering the strength of the Crown case, the court concluded that the key limitation in the doubts sought to be raised by the defence was that they tended to detract only from the less equivocal aspects of the Crown case and none undermined the force of the dying declaration, the arrest of DL at his home as he sought to flee, and the recovery of his clothes with the deceased's blood on them - the position was analogous to, if not stronger than, 'the compelling inference' referred to by the High Court in *The Queen v Baden-Clay* (2016) 90 ALJR 1013, [50]-[51] - in those circumstances the proviso was available - further, the most critical aspect of the blood splatter evidence was correct, so that the denial of procedural fairness was not a denial that precluded the application of the proviso - appeal dismissed [Editor's note: For sentence decision see *R v DL* [2008] NSWSC 1199; sentence appeal judgment: *DL v R (No 2)* [2017] NSWSC 58].

DL

Alkanaan v R [2017] NSWCCA 56
Court of Criminal Appeal of New South Wales
Payne JA, Harrison & Schmidt JJ
Criminal law - severity appeal - applicant convicted of murder - deceased had been involved with the applicant in drug dealing - applicant sentenced to 28 years 9 months, NPP 21 years 9 months - at trial, the applicant did not seek to deny that he had shot the deceased, but said that he did so in a state of fear and anger after being threatened with extreme violence - the jury rejected self-defence, however, the significance of the threats remained relevant on sentence - on his severity appeal, the applicant argued that the trial judge erred in a number of respects, including the assessment of the objective seriousness of the offending and in identifying aggravating factors - held: (1) objective criminality - a successful challenge to a finding of objective seriousness requires error to be established (*House v The King* (1936) 55 CLR 499) - the assessment of the objective seriousness is definitively evaluative so that differing outcomes within a range of acceptable tolerances is permissible - here, the judge was satisfied that the applicant shot the deceased with an intention to kill so that he was required to demonstrate that the finding that the offending was 'above mid-range' was not reasonably open, or that the conclusion was arrived at by reference to extraneous matters or by failing to take account of relevant matters - here, the applicant's contentions were significantly dependent upon acceptance of the applicant's version of what happened - the judge was entitled to reject the applicant's evidence - no error established; (2) applicant's mental health - *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; *Ngati v R* [2014] NSWCCA 125; *Benitez v R* (2006) 160 A Crim R 166, & *Aslan v R* [2014] NSWCCA 114) referred to - the mere fact of mental illness is not of

itself a necessary or sufficient indicator for a more lenient sentence - the sentencing court must examine the relevant factors in order to determine whether the mental condition has the consequence contended for - here, the judge did not consider that the applicant's moral culpability was reduced by reason of his identified mental condition - this was not a case where his lack of ability to reason as to the wrongness of his conduct lessened his moral culpability (*Muldrock v The Queen* (2011) 244 CLR 120, [54]); (3) aggravating factors - at the time of the offending, the applicant was on conditional liberty being subject to several s9 bonds - breach of conditional liberty is a matter that should be taken into account on sentence (*R v Cicekdag* (2004) 150 A Crim R 299, [7]) - this was not a matter relevant to the assessment of the objective seriousness of the offending however (*Chehab v R* [2015] NSWCCA 44, [32]) - the weight to be given to the applicant's commission of an offence while on conditional liberty was a relevant 'evaluative and discretionary element' (*Batty v R* [2016] NSWCCA 121, [64]) - no error identified; (4) remorse - a sentencing judge is not bound to accept assertions by an offender that he or she is remorseful, even when provided under oath (*Alvares v R; Farache v R* (2011) 209 A Crim R 297, [65]) - the applicant's post-offending conduct in attempting to flee, lying to the police, and in conspiring was relevant in assessing his remorse - in assessing the genuineness of evidence of remorse, a sentencing judge has a wide discretion - no *House v King* error identified; (5) manifestly excessive - the murder was a senseless, brutal and unnecessary killing - notions of deterrence, denunciation and punishment needed to be strongly reflected in the sentence - no error identified - appeal dismissed [Editor's note: Payne JA & Schmidt J agreeing with Harrison J].

Alkanaan

R v Jason Mark Grogan [2017] NSWSC 378
Supreme Court of New South Wales
Hidden AJ
Criminal law - sentence for manslaughter - offender, in a state of agitation, anger and aggression, fatally struck deceased, felling him with one punch - offender was convicted of murder and appealed, the CCA quashing the conviction and ordering a re-trial on manslaughter - the offender pleaded guilty and on an agreed statement of facts was sentenced - offender had experienced psychotic episodes of a hallucinatory nature as the result of his drug abuse and was diagnosed as substance dependence with recurrent drug psychosis - there was a possibility of an underlying schizophrenic illness - a victim impact statement was received (see *R v Halloun* [2014] NSWSC 1705, [46]) - Sentence: the offender was to be sentenced upon the basis that he did not intend to kill the deceased or to cause him serious injury - no other mitigating factors identified - aggravating factors identified as the deceased's advanced age (72 years) & the fact that the offence was committed in the victim's home - offence fell somewhat below mid-range - offender had an unfavourable criminal record and had not expressed remorse - 20% discount allowed - reasonable prospects of rehabilitation justified 'special circumstances' - sentence of 9 years 6 months, NPP 6 years 6 months imposed [Editor's note: For original sentence see *R v Grogan* [2013] NSWSC 1643; for appeal, quashing conviction and

ordering re-trial for manslaughter see *Grogan v R* [2016] NSWCCA 168].

Jason Mark Grogan

DPP v Robinson [2017] VSC 56
Supreme Court of Victoria
Elliott J
Criminal law - manslaughter - sentence - offender shot deceased in the chest at short range - offender 17 at time of homicide - offender convicted of manslaughter and entered pleas to thefts and burglaries - Sentence: being under 21 years, offender was a 'young offender' (s3(1) *Sentencing Act 1991* (Vic)) - while youth was a mitigating factor, given the degree of criminality involved in the crime of manslaughter, the sentencing objectives of deterrence, denunciation, just punishment and protection of the community became more prominent in the sentencing calculus (*Azzopardi v The Queen* (2011) 35 VR 43, [44])-manslaughter is a very serious crime - the offender's prospects of rehabilitation were not good, but there was a real prospect that he might take advantage of the courses available in prison so that a shorter non-parole period was appropriate - specific deterrence had also to be considered - term of 9 years imposed for manslaughter - effective term 10 years, NPP 6 years 6 months.

Robinson

DPP v Baea [2017] VSC 40
Supreme Court of Victoria
Elliott J
Criminal law - murder - sentence - offender, who had no prior convictions and was otherwise of good character, pleaded guilty to the murder of a woman who had befriended him - the deceased was stabbed 38 times - the offender was jealous of the life her son appeared to lead - Sentence: the judge could not be satisfied beyond reasonable doubt that the killing was premeditated - although not a 'young offender' (see s3(1) *Sentencing Act 1991* (Vic)), the offender was only 21 years at the time of the offence - the high degree of criminality involved required the sentencing objectives of 'deterrence, denunciation, just punishment and protection of the community' to become more prominent in the sentencing calculus (*Azzoparid v The Queen* (2011) 35 VR 43, [44]) - prospects of rehabilitation were taken into account, as was the offender's youth - the plea of guilty was consistent with remorse and an expressed desire to repent (see *Phillips v The Queen* (2012) 37 VR 594, [36.5]; *DPP v Nguyen* [2010] VSCA 31, [28]) - sentence of 22 years, NPP 17 years imposed.

Baea

The Queen v Liszczak & Phillips [2017] VSC 103
Supreme Court of Victoria
Croucher J

Criminal law - sentence - joint criminal enterprise - offenders pleaded guilty to charges of attempted arson (ss197(1) & (6), 321 *Crimes Act 1958* (Vic)); theft (s74 *Crimes Act 1958*); arson (ss197 (1) & (6) *Crimes Act 1958*); firearms offences (s5(1) *Firearms Act 1996* (Vic)); criminal damage and recklessly causing injury (ss197(1) & 18 *Crimes Act 1958*); recklessly endangering a person by shooting at police (s23 *Crimes Act 1958*) - Sentence: as it was not possible to identify which offender had thrown the Molotov cocktails, stole the vehicle, burnt it, or which of them had fired at police, they were to be sentenced on the basis that each was equally responsible for the actions of the other (joint criminal enterprise liability) - the objective seriousness of the offences was assessed individually - the most serious offences involved shooting at police - these were 'top end' examples of such offences - a significant aggravating factor was that the police were shot at in the course of performing their duty - the appropriate sentences were the highest ever fixed for such offences - offender's pleas of guilty were to be accorded utilitarian value - no remorse identified - offenders still relatively young men - their prospects of rehabilitation were guarded, but it was important to recognise the interplay between rehabilitation and protection of the community - considering the purposes of sentencing, general deterrence, just punishment, denunciation and protection of the community were important sentencing considerations - current sentencing practices, the principal of parsimony (s5(3) *Sentencing Act 1991* (Vic)), totality and parity considered - sentences imposed.

Liszczak & Phillips

RMD v The State of Western Australia [2017] WASCA 70
Court of Appeal of Western Australia
Buss P, Mazza JA & Beech J
Criminal law - sexual offences - appellant convicted in October 2014 of 2 counts: indecent dealing with a child under 13 (s320(4) *Criminal Code Act 1913* (WA)) & indecent dealing with a child aged between 13 & 16 (s321(4) *Criminal Code Act 1913*) - appellant did not give, or adduce, evidence at trial, but his record of interview with police was played to the jury in the Crown case - the appellants case was that the offending alleged in court 1 did not occur and that his conduct in relation to events surrounding the alleged offending in count 2, was misconstrued - appellant sentenced to 2 years 6 months - Notice of Appeal was not filed until February 2016 - the appellant argued that the trial judge erred in admitting propensity evidence and in failing to give proper Longman and Liberato directions - held: (1) extension of time - application refused (*Wimbridge v The State of Western Australia* [2009] WASCA 196 identifies the principles governing the exercise of the court's discretion to extend time); (2) propensity evidence (s31A *Evidence Act 1906* (WA)) - the test for admissibility of 'propensity' and 'relationship' evidence is set out in s31A(2)(a) & (b) - the concept of 'significant probative value' was considered in *Dair v The State of Western Australia* (2008) 36 WAR 413, [60]-[61] - the test in s31A(2)(a) explained at [50] - s31A(2)(b) explained at [51] - in assessing the risk of an unfair trial, the court must take account of directions that might be given to the jury to overcome the prejudice and their likely effect on the jury - the court must also consider the

conclusion that fair-minded people would draw from a comparison of the issues (*Johnson v Johnson* (2000) 201 CLR 488, [53]) - further observations on the phrase 'significant probative value' and s31A identified [52] - here, if the jury were satisfied beyond reasonable doubt as to the truthfulness of the complainant's evidence, then the evidence in issue had significant probative value in the context of fact-finding in relation to count 1 - ground 1 not made out; (3) *Longman* direction - a judge is bound to give an instruction or warning to a jury if, in the circumstance of the case, the instruction or warning is necessary to avoid a perceptible risk of a miscarriage of justice (*Carr v The Queen* (1988) 165 CLR 314, 324-5; *Longman v The Queen* (1989) 168 CLR 79,86; *Tully v The Queen* (2006) 230 CLR 234, [123], [158]; *RPS v The Queen* (2000) 199 CLR 620, [41]) - the rationale for giving a *Longman* direction is that a jury might fail to appreciate that, as a result of a substantial delay between the occurrence of the alleged offence and the accused being informed of the complaint, the accused will have suffered forensic disadvantage by losing the chance adequately to test the complainant's evidence and the chance adequately to marshal a defence (see *SPB v The State of Western Australia* [2012] WASCA 136, [51]) - the accused will not be 'informed of the complaint' unless particulars of the complainant are provided to enable the accused to make enquires and to marshal a defence [13] - a warning will also have to be given where there is substantial delay between the accused's receipt of the necessary information and the commencement of criminal proceedings - here, despite a substantial delay, the judge's directions were adequate; (4) *Liberato* direction - a *Liberato* direction is not required as a matter of law, but should be given if there is a real (as distinct from a fanciful) risk that the jury might otherwise have the impression that disbelief of an accused's evidence, or preference for a complainant's evidence, means that the State has proved its case beyond reasonable doubt (*Cooper v The State of Western Australia* [2010] WASCA 190, [38]) - here, the direction given was not erroneous - appeal dismissed [Editor's note: Mazza JA & Beech J agreeing with Buss P].

RMD

The State of Western Australia v Herbert [2017] WASC 101
Supreme Court of Western Australia
Jenkins J
Criminal law - judge alone trial (s118 *Criminal Procedure Act 2004* (WA)) - accused charged with threats to kill and acts endangering life - defence of unsoundness of mind relied upon - held: accused's statements to medical professionals as to his feelings and symptoms at the time he spoke were admissible to prove his feelings and symptoms at that time (*Ramsay v Watson* (1961) 108 CLR 642) - the accused bore the onus of proving, on the balance of probabilities, that he was not of sound mind at the time he did the acts which are alleged to constitute each offence (s26 *Criminal Code Act 1913* (WA) *('Code')*; *R v Porter* (1933) 55 CLR 182) - whether the accused proves he was not of sound mind depends on the application of ss27(1), 28(1) & (2) *Code* - 'mental impairment', 'infirmity of the mind' and 'mental illness' considered - *R v Falconer* (1990) 171 CLR 30 & *Evans v The State of Western Australia* [2010] WASCA 34 discussed - 'capacity to know that he ought not to do the act' (*Stapleton v The*

Queen (1952) 86 CLR 358, 367) considered within the context of intoxication - *The State of Western Australia v Brown [No 3]* [2013] WASC 349 & *The State of Western Australia v Lang [No 2]* [2016] WASC 206 applied - *Code* s27 only applies where the accused's state of mental impairment, which by definition does not include temporary intoxication by drugs and/or alcohol, deprives the accused of one of the relevant capacities - the onus was on the accused to prove that any mental impairment he suffered deprived him of a relevant capacity - considering the role of *Code* s28: even when the accused can prove that his mental impairment deprived him of relevant capacity, he will not be able to avail himself of the insanity defence if he was voluntarily intoxicated at the time he did the relevant acts - the onus lies upon the accused to prove that he was not voluntarily intoxicated - here, the evidence from the psychiatrists was that the accused was intoxicated by cannabis and alcohol and that he had the capacity to understand what he was doing and to control his actions - the accused failed to prove that his mental impairment deprived him of the relevant capacity - findings of guilt entered in respect of each charge.

Herbert

R v Al-Harazi (No 6) [2017] ACTSC 63
Supreme Court of the Australian Capital Territory
Refshauge J
Criminal law - murder - 4 evidence-in-chief interviews were conducted by the police with the one witness - the evidence contained contradictions and the question was whether all interviews should be played to the jury, or only the last - rationale & legislative history of provisions for evidence-in-chief interviews considered (Div 4.2.2A *Evidence (Miscellaneous Provisions) Act 1991* (ACT)) - procedure of editing interviews to exclude inadmissible material considered (*R v PT* (2013) 233 A Crim R 483; *In the Matter of an Application by JC* [2010] ACTSC 134; cf *R v A2; R v KM; R v Vazire (No 21)* [2016] NSWSC 24, [37]-[45]) - held: the Crown should not adduce the evidence chronologically - it should not be allowed to play the first three interviews followed by then the fourth, where the fourth is the only one on which it wishes to rely as evidence to be given by the witness of the facts - the Crown should not be denied the opportunity to play the earlier interview, however - therefore the fourth interview should be played first and then the witness should be asked about the earlier statements made, by reference to the witness's statements in the fourth interview denying the truth of what he had earlier told the police.

Al-Harazi

The Cloud Confines

By Dante Gabriel Rossetti

The day is dark and the night
To him that would search their heart;
No lips of cloud that will part
Nor morning song in the light:
Only, gazing alone,
To him wild shadows are shown,
Deep under deep unknown
And height above unknown height.
Still we say as we go,
"Strange to think by the way,
Whatever there is to know,
That shall we know one day."

The Past is over and fled;
Nam'd new, we name it the old;
Thereof some tale hath been told,
But no word comes from the dead;
Whether at all they be,
Or whether as bond or free,
Or whether they too were we,
Or by what spell they have sped.
Still we say as we go,
"Strange to think by the way,
Whatever there is to know,
That shall we know one day."

What of the heart of hate
That beats in thy breast, O Time?
Red strife from the furthest prime,
And anguish of fierce debate;
War that shatters her slain,
And peace that grinds them as grain,
And eyes fix'd ever in vain
On the pitiless eyes of Fate.
Still we say as we go,
"Strange to think by the way,
Whatever there is to know,
That shall we know one day."

What of the heart of love

That bleeds in thy breast, O Man?
Thy kisses snatch'd 'neath the ban
Of fangs that mock them above;
Thy bells prolong'd unto knells,
Thy hope that a breath dispels,
Thy bitter forlorn farewells
And the empty echoes thereof?
Still we say as we go,
"Strange to think by the way,
Whatever there is to know,
That shall we know one day."

The sky leans dumb on the sea,
Aweary with all its wings;
And oh! the song the sea sings
Is dark everlastingly.
Our past is clean forgot,
Our present is and is not,
Our future's a seal'd seedplot,
And what betwixt them are we?
We who say as we go,
"Strange to think by the way,
Whatever there is to know,
That shall we know one day."

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