

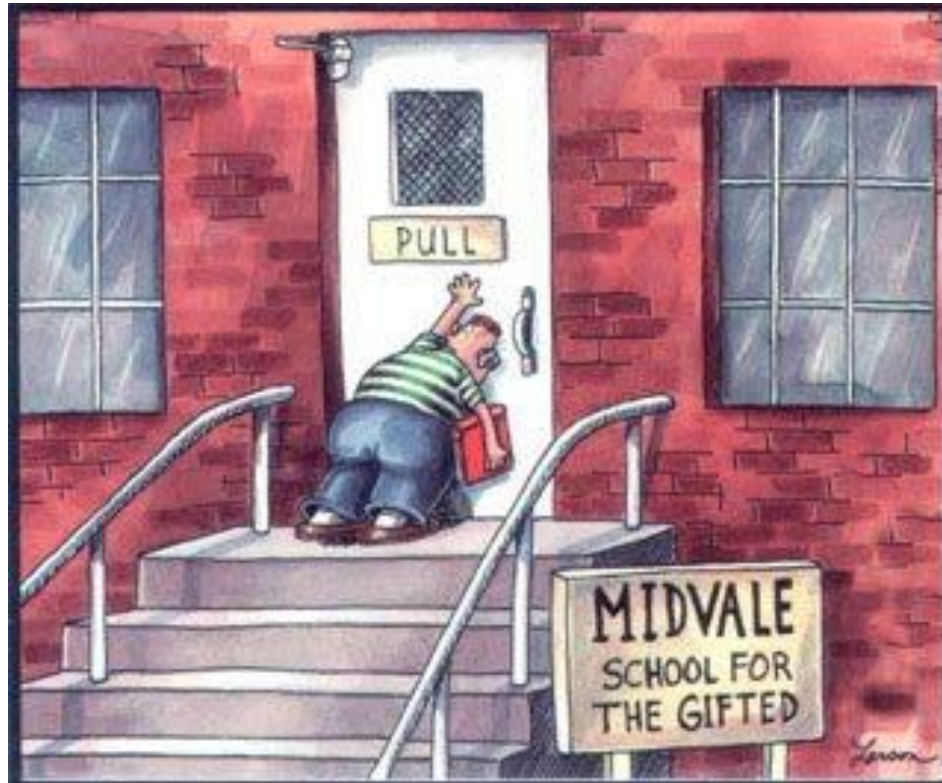


# Technology and Due Diligence

Presented by

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# Outline

- Due Diligence Review
- Case Law
- Theories and Solutions

# Due Diligence Review

# Test

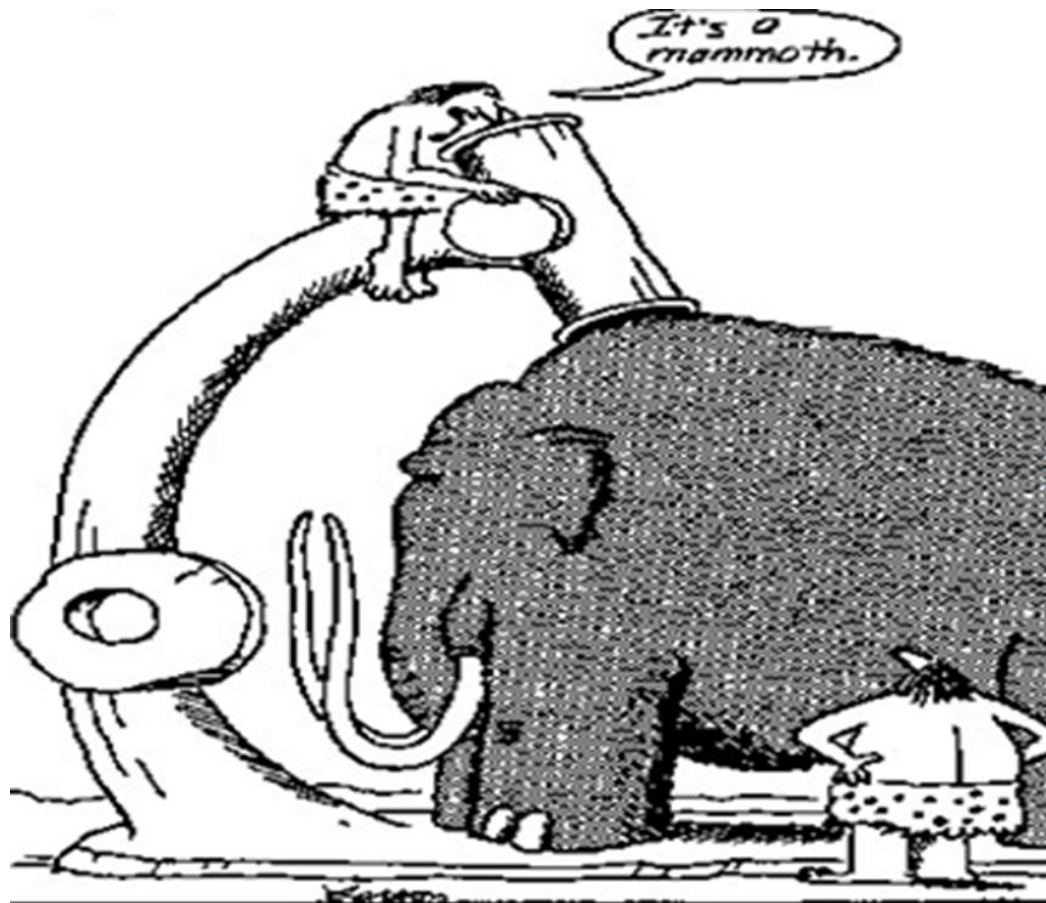
- Whether *all reasonable care* was taken in the circumstances to avoid the accident, or was the defendant operating under a mistake of fact....?



# Practical Realities

- Reverse onus
- Presumption of guilt
- Legal test
- Reasonable person
- High expectations
- Hindsight bias

# Recent Case Law



## The First Court



## ***Safety Compliance Insider***

- November 2012 edition
- Annual Due Diligence Scorecard



## ***Safety Compliance Insider*** (Cont'd)

- Survey of “Reported” Trials
- July 2011 - November 2012
- 15 cases



## ***Safety Compliance Insider*** (Cont'd)

- One win for defendants (AB)
- 14 wins for prosecutors (AB, BC, NL, NS, ON, SK, and YK)
- [www.OHSInsider.com](http://www.OHSInsider.com)

**safety compliance insider**   
Your Plain Language Guide to C-45, OHS & Due Diligence



## ***Safety Compliance Insider*** (Cont'd)

- Only acquittal overturned at 1<sup>st</sup> level
- Appeal to ABCA in June 2013

# Common Themes

- High expectations
- Human error prevalent
- Focus on training and supervision
- Words are important
- Competency deficits
- Documentary gaps

## ***WCAT-2012-00070***

- Regulator given anonymous tip
- Construction company struck 7200-volt underground cable
- Investigation commenced
- Determined no underground utility locate obtained before work commenced
- Administrative penalty imposed



## ***WCAT-2012-00070*** (Cont'd)

- Company appeals
- Company says “human error”

## ***WCAT-2012-00070*** (Cont'd)

- Human error argument was non-responsive
- “Accidents are usually due to human error.”
- The issue is whether the employer took all reasonable steps to prevent the error
- Only evidence related to an investigation related to a underground near-miss the year before





## ***WCAT-2012-00070*** (Cont'd)

- Vice-Chair upholds administrative penalty
- Impressed by quick compliance
- Rewards company for efforts
- Reduces by 30%



## Quick Summary

- Accidents usually involve human error
- Company is not vicariously liable for error
- The question is what did the company do to prevent the error?

Technology advances...



...people stay the same

## ***R. v. Concord Paving Ltd.***

- 2012 conviction (Nfld. & Lab. Prov. Court)
- 2009 fatality of flag person
- Working on a public highway
- Ditching and grubbing operation
- Flag person crushed by excavator

## ***R. v. Concord*** (Cont'd)

- Employer charged with six OHS charges
- P. Eng. determined only needed two flaggers
- They could see each other from 50 meters
- Accident happened on curve
- Obstructed view

## ***R. v. Concord*** (Cont'd)

- Traffic manual said three flag people needed or two-way radios if vision obstructed
- Trial judge concludes vision obstructed by curvature
- Flaggers needed to be too close
- Should have had three flaggers or two-way radios

## ***R. v. Concord*** (Cont'd)

- Convicted on two charges
- Failing to have third flagger or radios
- Failing to provide information, instruction, training and supervision to workers

## ***R. v. Concord*** (Cont'd)

- Experienced operator
- Was not pivoting cab to look forward
- Operator knew better
- Admitted he should not have moved without checking to make sure no one in way
- Testified deceased had been too close before and talked to him – did not report it





## ***R. v. Concord*** (Cont'd)

- Employer required basic certificates to operate
- Manual referenced form for “Employee Training Record”

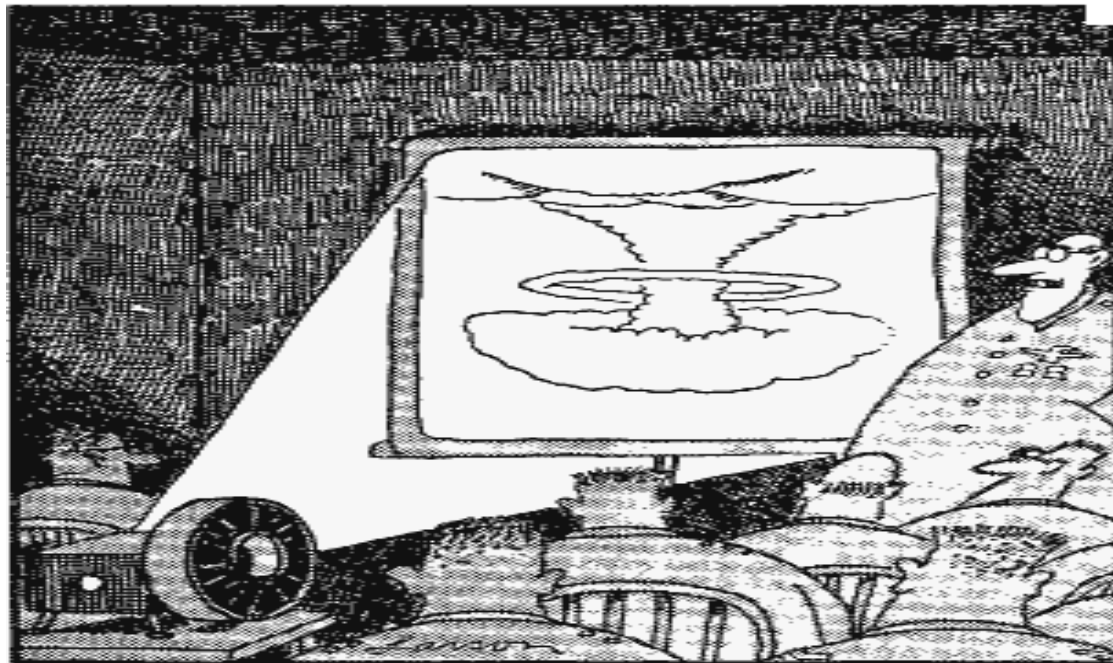
## ***R. v. Concord*** (Cont'd)

- No evidence of form tendered
- No evidence of periodic evaluations of operators
- Other flag person could not define what was meant by keeping a “safe distance”



## Quick Summary

- Human error: P.Eng., Operator, Flaggers
- No employee training record
- No periodic evaluations



**“Now this next slide, gentlemen, demonstrates the awesome power of our twenty megaton ... for crying out loud! Not again!”**

## ***R. v. Della Valle***

- Nova Scotia Provincial Court
- Maintenance worker reported concerns about asbestos to supervisor
- Gave sample to OHS Coordinator
- Laboratory confirmed asbestos and what safety measures needed to be taken



## ***R. v. Della Valle*** (Cont'd)

- Should inform workers
- OHS Coordinator told two maintenance supervisors about results and safety measures
- Supervisors didn't follow through
- Nor did OHS Coordinator

## ***R. v. Della Valle*** (Cont'd)

- Electrician notifies Regulator
- Housing Authority, Supervisor and OHS Coordinator charged with OHS offences
- Housing Authority and Supervisor plead guilty
- OHS Coordinator goes to trial

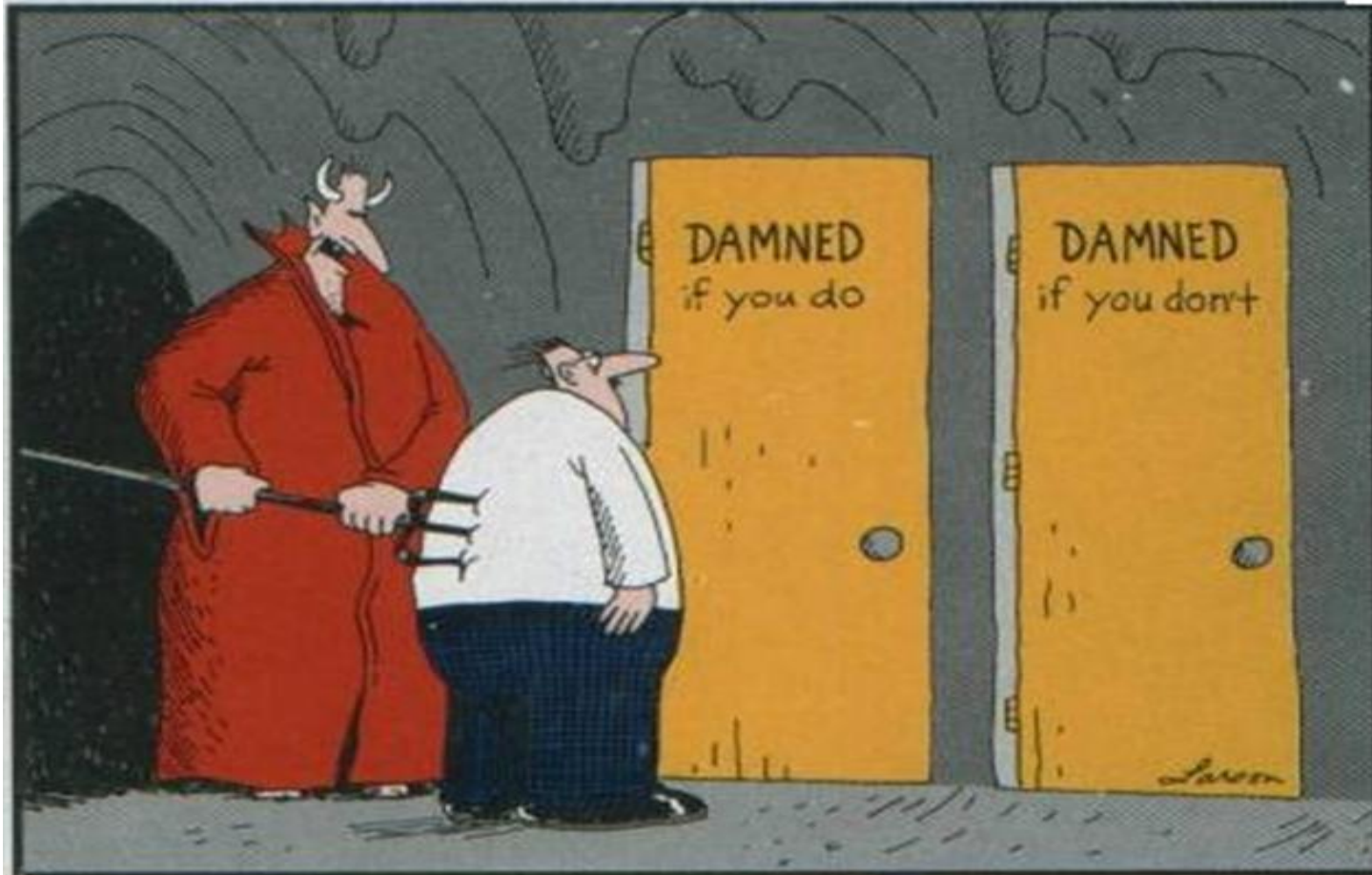
## ***R. v. Della Valle*** (Cont'd)

- Convicted
- Not for what he did, but for what he didn't do
- Should have:
  - Immediately notified his supervisor
  - Followed-up with supervisors
  - Reported to JOHS
  - Instigated formal hazard assessment



## Quick Summary

- Knowledge
- Trial judge applied test of “reasonable prudent person in the defendant’s position, possessed with such knowledge, ought to have undertaken
- Offence of omission



**"C'mon, c'mon — it's either one or the other."**



# Theories and Solutions





## Main Question

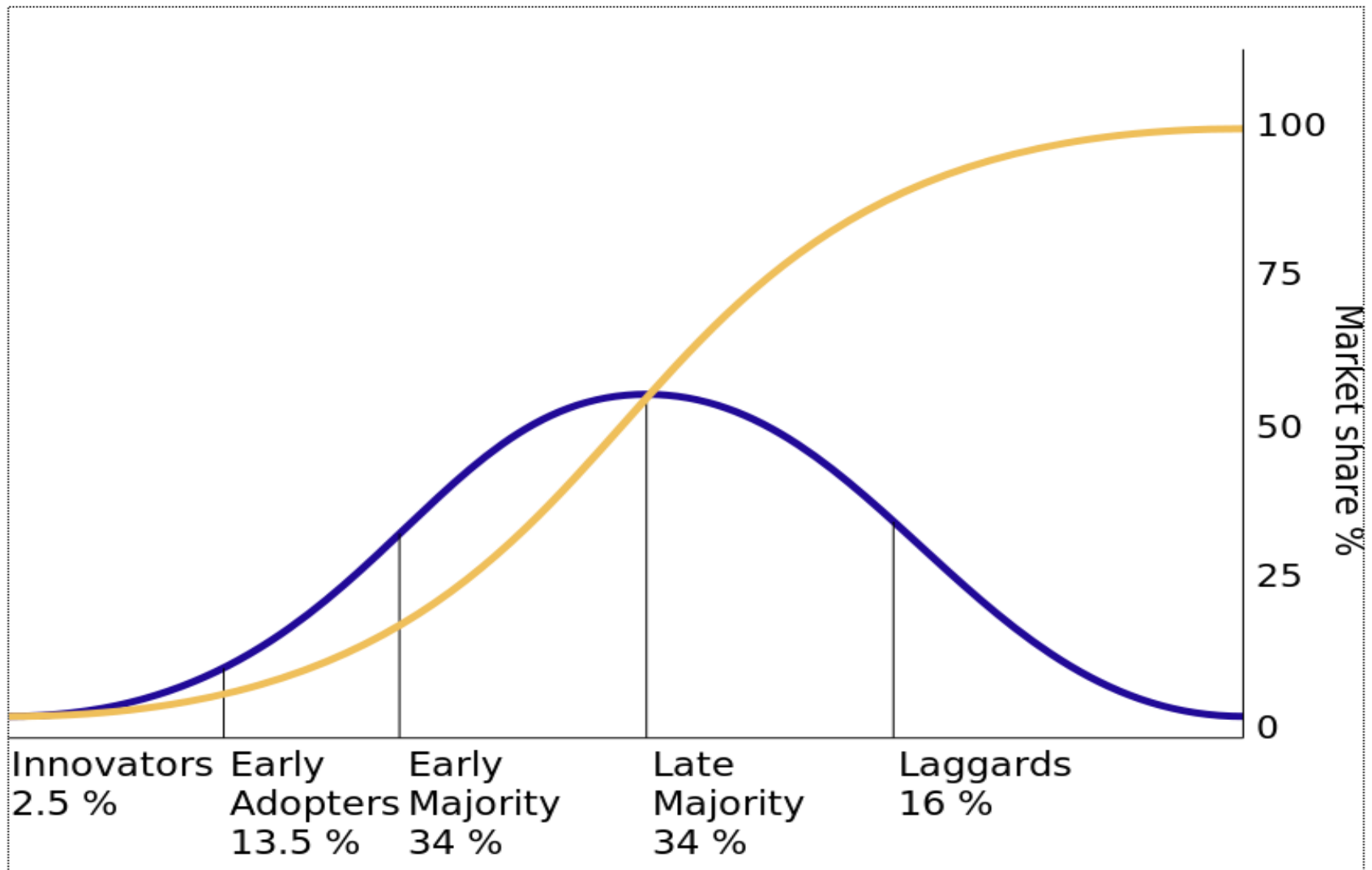
- Is technology changing the law of due diligence?

## Answer

- No
- The test is the same
- The standard of care is changing
- Raising expectations

# Adoption of Technology

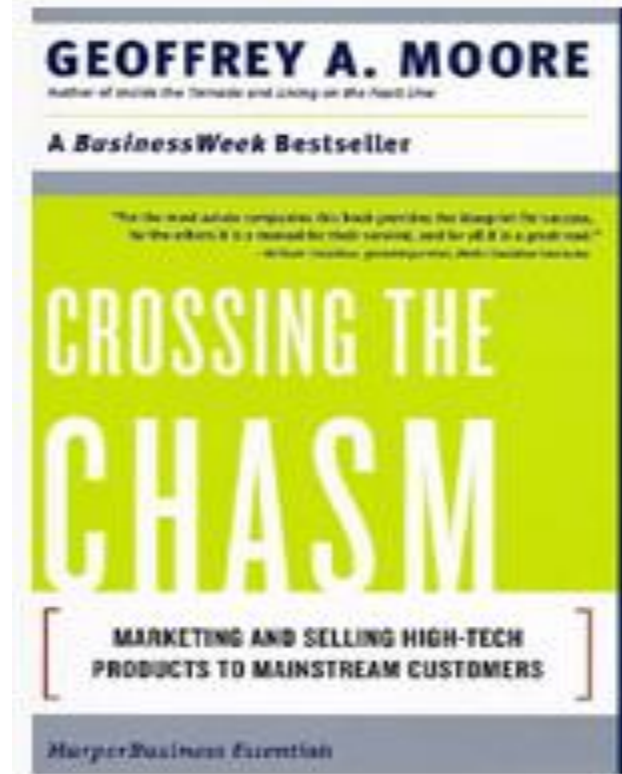
- Everett Rogers
- *Diffusion of Innovations*, 1962
- Theory explains rate of new ideas and technology spread through cultures

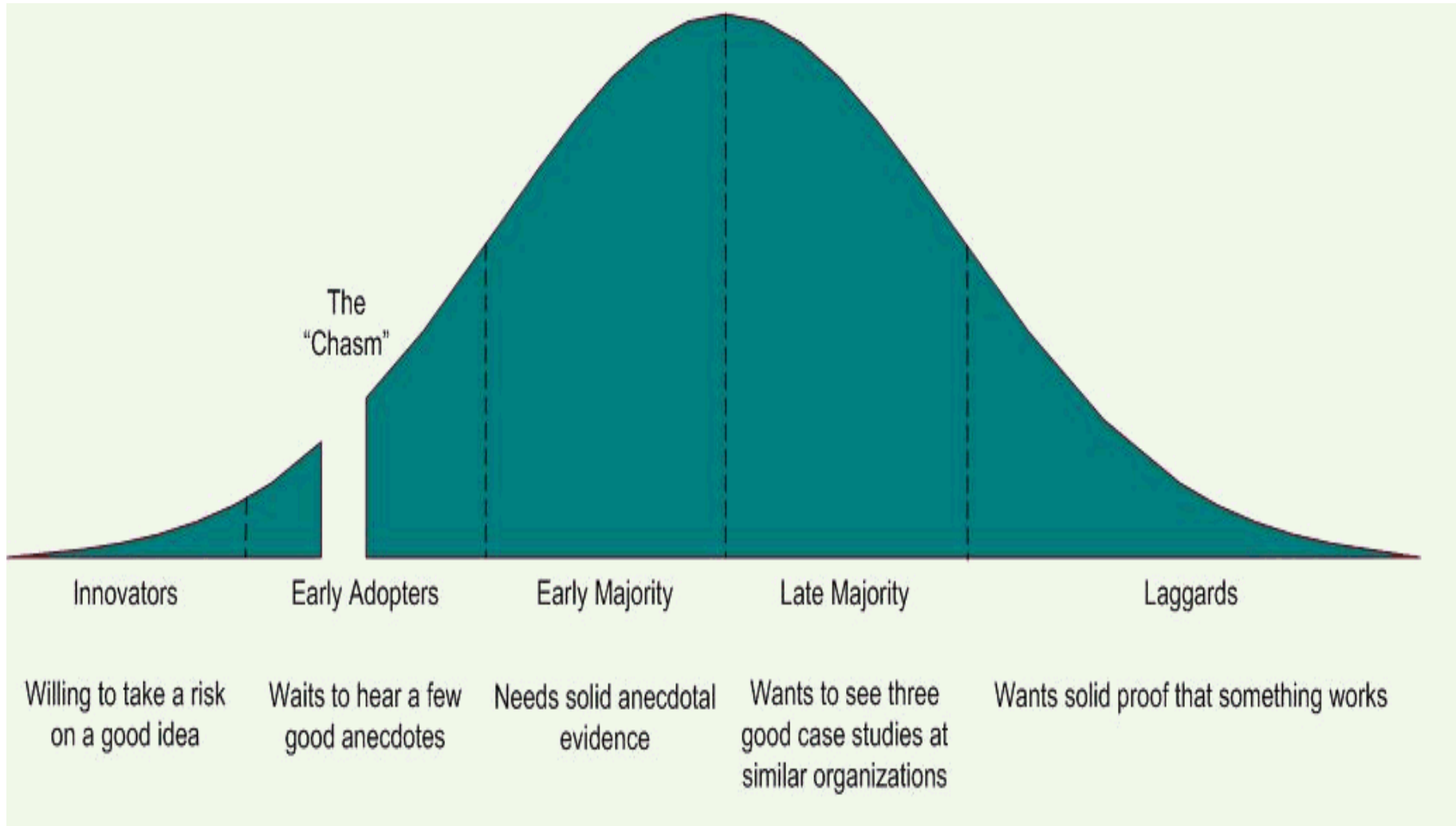




# The Chasm

- Geoffrey Moore
- *Crossing the Chasm* (1991)
- Marketing of high tech products



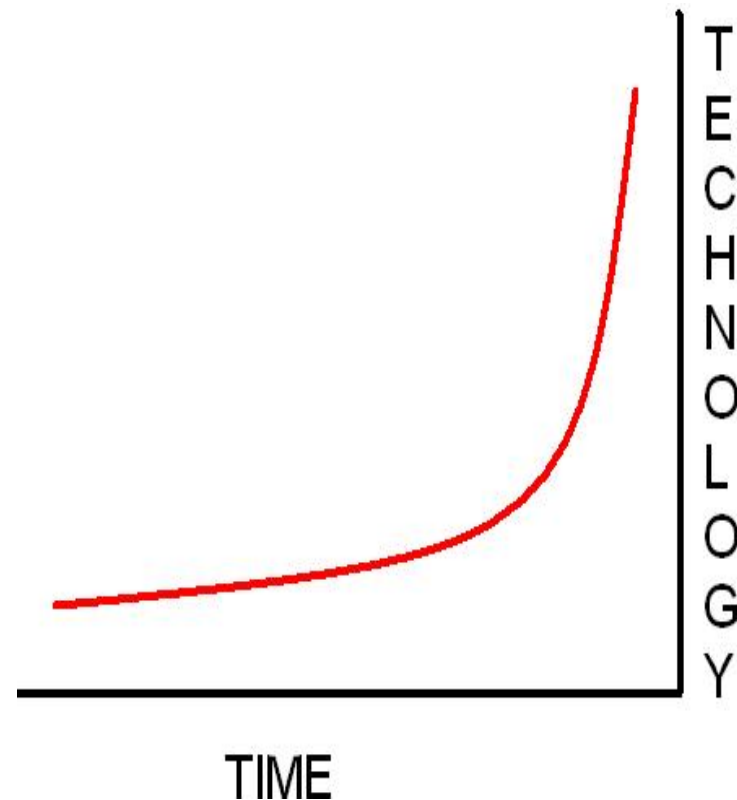




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# Accelerating Change

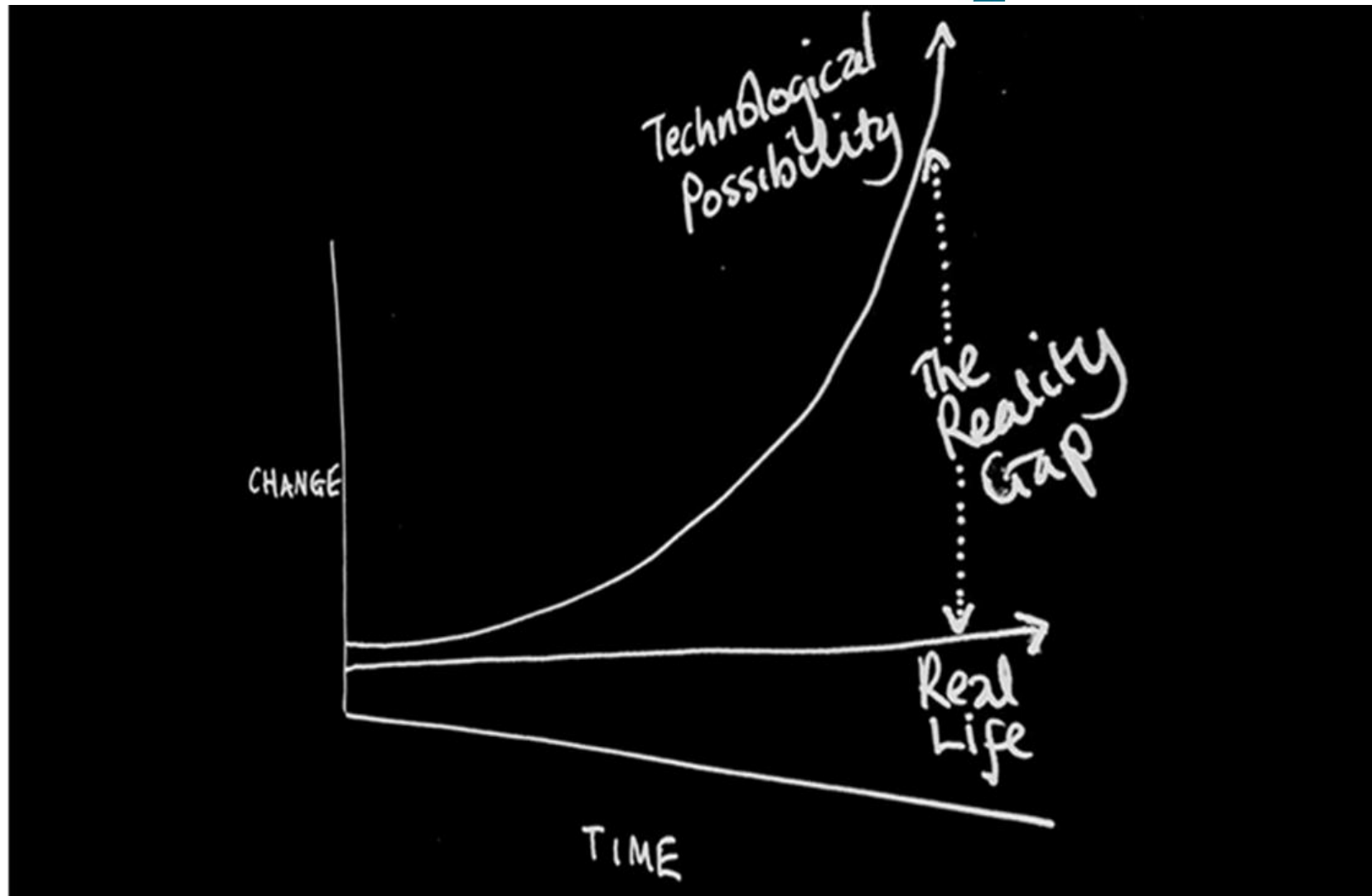
- Increase in the rate of technological progress
- Faster and more profound change in the future
- Exponential growth



# Solutions?

- New is not always better
- Practical realities





# Fitness for Duty

- Optical scanners
- Measures alertness
- Drug & Alcohol Testing
- Six Safety Systems





# Accessibility

- Did you know Alberta and BC both require employers to make legislation readily available for reference by workers?



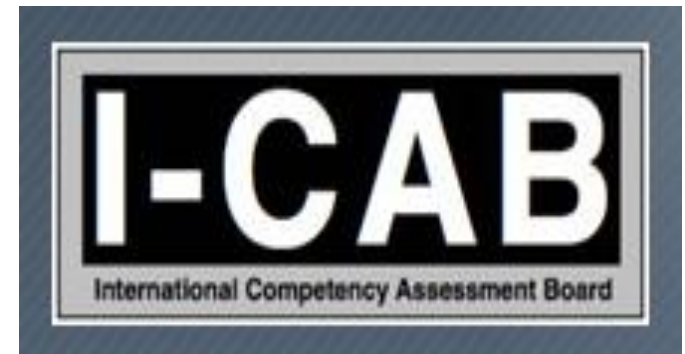
# Accessibility

- June release
- Android, iPad, iPhone
- Second generation?



# Competency

- International Competency Assessment Board
- Proctored assessments
- Knowledge feedback
- Professional development





# Training

- Online training
- Efficient
- Effective
- Consistent

 **AFTERMATH**  
of a workplace accident

**THANK YOU!**