Research Report

Background
Increasing numbers of separated and divorced parents require assistance from the family courts to make decisions about child contact (formerly known as ‘access’). In most courts these litigating parents will be encouraged to find a solution to the dispute by attending in-court conciliation, a form of mediation or dispute resolution held on court premises. There were 32,537 such meetings in England in 2005/6, approximately half of all private law applications (CAFCASS, 2006).

The theoretical advantage of conciliation, or mediation more generally, is that it offers the prospect of a speedier, less intrusive and more responsive outcome compared to an outcome imposed by a judge. In practice, however, researchers have raised concerns about the potentially coercive nature of brief negotiations in a highly-charged court environment. In the largest recent study of conciliation, Trinder et al. (2006) found high ‘agreement’ rates amongst a sample of very challenging cases following a brief professional input. There are suggestions that these outcomes reflect a strong legal culture of settlement and a contact presumption that may place too much pressure on disputants to reach an ‘agreement’ (Davis, 1988; Ogus et al, 1989; Bailey-Harris et al, 1999; Trinder et al., 2006), including in cases where there are child protection or domestic violence concerns (e.g. Bailey-Harris et al, 1999; Neale & Smart, 1997; MCSI, 2003). More broadly, our research took place against a backdrop of significant public concern about bias within the family justice system and a lack of transparency (DCA 2006, MoJ 2007).

Currently, however, very little empirical research has examined how mediation meetings are undertaken as communicative events, and we therefore have scant understanding not only of how matters relating to bias, fairness, safety etc. are addressed through communication within the meetings, but also how the actual dispute resolution work is undertaken as a talk-based, communicative process. We used Conversation Analysis (CA) to examine how conciliation is undertaken through spoken interaction. A small number of studies of dispute resolution in legal and community settings have already demonstrated the capacity of CA to unlock the ‘black box’ of dispute resolution processes (e.g. Maynard, 1984; Manzo, 1997; Garcia, 1991, 1997, 2000; Dingwall & Greatbatch, 1991; Greatbatch & Dingwall, 1997, 1999). Our study was in this tradition, exploring in fine detail, the actual situated interactional processes through which dispute resolution work gets done.

Aims and Objectives
We had three aims in undertaking this study.

Aim 1 ‘To advance theoretical and empirical understanding of decision making within the family courts’. We have met this aim fully through the analysis of the data (see ‘Findings’ below), the preparation of conference papers and peer reviewed journal articles (see above Section 2 ‘Dissemination’ and ‘Outputs’ below) and dissemination events (see ‘Activities’ and ‘Impacts’ below).
Aim 2 “To enhance transparency, inform policy and identify specific areas of professional practices and competences that may be improved”. We have fully met this aim. The findings from the study have done much to shed light on hitherto hidden processes within the family courts (see ‘Findings’ below). We have actively engaged with policy-makers and practitioners within the family justice system (see ‘Impacts’ below). We were able to feed findings directly into the national-level policy review of the private law programme, including conciliation. We would highlight, in particular, the influence of our draft article on the decision of policy-makers to require that risk assessments are undertaken away from court in future. Our findings on openings, the role of children, and risk, have proved to be of particular interest to practitioners.

Aim 3 To demonstrate the benefits of the CA method for socio-legal research. Our findings have proved of great interest in the socio-legal research and the policy and practice communities to date. An additional benefit of the research has been the development of research capacity amongst the team to conduct future studies in the family law field using conversation analysis.

The aims were underpinned by a single objective “to uncover, explicate and describe in detailed ways the communicative nature of the work undertaken in in-court conciliation”. We met this objective fully. We describe below and in the ‘findings’ section the results of our detailed investigation of conciliation.

As CA is an inductive approach we chose not to pre-specify any further objectives, but instead were guided, but not constrained, by a number of research questions prompted by previous CA and non-CA studies. The research questions were as follows:

- **What are the objectives of conciliators as they are manifested in the micro-interactional details of in-court conciliation meetings? How are possible tensions between parent and conciliator objectives addressed?** This question underpinned much of the analysis. It is addressed particularly in the emotion management and risk papers (see ‘Findings’)

- **What are the interactional processes by which agreements are achieved, negotiated and/or impeded? How are proposals elicited, disclosed, challenged, modified and developed during the dispute encounters?** This was a key issue in the work on openings and formulations (see ‘Findings’)

- **How are sensitive topics, including allegations of abuse or harm, raised and responded to?** This was addressed in the risk paper (see ‘Findings’)

- **How do conciliators and disputants construct the role of the conciliator?** Addressed, particularly in the openings paper (see ‘Findings’)

- **How are the rights and needs of children and parents discursively framed by conciliators and disputants, and how are these rights and needs made manifest in the conciliation process?** Addressed in the child paper (see ‘Findings’)

In addition we are working on additional papers addressing these research questions (see Section 2 ‘Dissemination’ for details).

**Methods**

The study consisted of highly detailed, conversation analysis-based analyses of audio-recordings of fifteen in-court conciliation sessions. The fifteen audio recordings had been made in 2004 as part of a larger study of the process and outcomes of in-court
conciliation (Trinder et al. 2006) but had not been transcribed or analysed until the current study.

Data: The audio recordings consist of the interaction between the conciliator (a CAFCASS officer)\(^1\) and the two parents. In some instances there are occasional interjections from solicitors, if present. Informed consent for recording and analysis was obtained from all the parties involved prior to the session. On average, the session recordings average forty minutes in duration.

Sample: The fifteen sessions are drawn from four different English county courts. Each case concerns contact between a child and non-resident parent. The selection of cases was to a degree constrained by the requirement to obtain informed consent from all parties. Fortunately the sample of fifteen is broadly representative of the wider sample of 112 cases (Trinder et al, 2006). Contact had previously broken down in nine of the fifteen cases, mirroring the wider data set. Similarly, seven of the sessions ended in a full agreement, six in a partial agreement and two without an agreement. This agreement rate is very close to that found in the larger sample.

Analysis: Our study, like all other CA studies, was empirically driven, utilising both the actual (audio) recordings and detailed transcripts of the recordings. The latter amounted to approximately 700 pages of transcription. Analyses were supported by ethnographic information relating to the setting in focus. Working in tandem with the recordings and the transcripts, we followed established CA analytic practices of identifying and uncovering patterns of interaction, and attending to the ways in which social interaction, mediated through talk, is rendered meaningful (Psathas, 1995).

Results
Given the time-frame of the research project, we are confident that we have met our objective, which was to uncover, explicate and describe in detailed ways the communicative nature of the work undertaken in in-court conciliation, or 'court-based mediation'. We did this by adopting an inductive, data-driven approach to our empirical materials, guided by the question: 'How do both mediators and parents (as 'disputants') collectively undertake the task of mediation?' Our analyses ultimately focused on three key themes:

(1) Framing the process and the issues
(2) Managing conflict
(3) Pursuing resolution

We have produced a total of five journal articles and are currently working on five additional journal articles that in various ways cover the three key areas. Each of the key areas, and the articles connected to them, will be outlined below. We conclude this section by considering the implications of our analyses for theory and practice.

---
\(^1\) CAFCASS is the Children and Family Court Advisory and Support Service, a national Non-Departmental Public Body with a remit to advise the court in family proceedings. CAFCASS officers typically have social work qualifications.
1. Framing the process and the issues

One of the key issues for the study was to uncover how interactants collectively established how conciliation was to be conducted and what conciliation was about. We have three distinctive sets of findings addressing how conciliation is framed: (1) On openings, (2) on the role of children and (3) on the management of risk allegations. We address each in turn.

(a) Opening Up Mediation Openings: How mediators initiate child-contact mediation meetings (submitted to Language in Society)

This article examined the openings of the child-contact mediation meetings. We uncovered how the parties collectively orient to (and thus co-construct) the mediator as the 'leader' of the meeting. In this role, mediators call the meeting to order, reveal the legal rationale underpinning the meeting, outline interactional 'groundrules' the disputing parties are expected to abide by (thereby socialising the disputants in the appropriate manner of engagement), indirectly convey what they see as the appropriate interactional tenor of the meeting, and in different ways elicit 'initial positions' from the disputing parties – all within a single turn at talk. We uncovered a prevalence of mediator utterances that quite clearly seek to socialise the inexperienced parents - as mediation neophytes - into the 'community of practice' (Lave and Wenger 1991) that is child-contact mediation. We showed how mediators ascribe, define, delimit and render explicit situationally relevant roles – for example, 'parents' or 'ex-partners'. These identity ascriptions are predicated on a set of assumptions relating to culturally- and 'category-bound' (Sacks 1992) behaviour associated with (good) parenting, assumptions which the parents are expected to share, recognise and find meaningful.

We described how mediators’ turns are constructed in such a way so as to display institutionality and formality, but also, simultaneously, elements of informality, the latter made evident particularly in the way in which talk is produced. This interweaving of formal and informal serves the interests of all parties, not least the mediator, whose role it is to engage the parties present – who most likely share a fraught relationship history - in an open and receptive exchange of viewpoints, based on flexibility and accommodation, a constructive approach to the subsequent arguments, viewpoints and suggestions that successful mediation entails. Without such an attitudinal approach being adopted and enacted in line with the legal parameters of the setting, a mutually acceptable resolution and durable child-contact arrangements are unlikely to be achievable.

This article – which is, as far we can tell, the first of its kind to examine in detail the openings of mediation meetings – sheds important light on how professional tasks, roles and responsibilities are framed and talked into being, and enhances our understanding of the complexities of the mediation process.

(b) Talking children into being in absentia? Children’s rights and wellbeing in child-contact mediation (submitted to Childhood)

In law, the child’s welfare must be the court’s paramount consideration, and additionally the child’s views (subject to age and understanding) are an important part of interpreting welfare. In practice, however, it is parents rather than children who make court applications and who attend mediation. We were interested, therefore, in how, if at all, children were ‘talked into being’ in absentia.

Our analysis suggested that in practice the focus of the mediation meetings we have examined is towards the resolution of adult disputes rather than exploring children’s
needs and wishes in any detail. Where children are invoked, mediators focus on the universal or 'generic' needs of all children ('Everychild') or large sub-sets of children ('girls' or 'teenagers'). The needs and wishes of individual children are not invoked or sought, particularly in the early phases of the meetings. We suggest that the emphasis on generic needs may be one means of limiting emotionality and conflict by avoiding contestable matters. Some of these issues are illustrated in the following sequence:

Extract 1 – Session C

1 FCA: er:m a- what I get essentially is: is your application and erm (.) and
2 the information I’ve got on here is
3 -> that there’s erm: (0.5) o:ne chi:ld
4 -> (.) er:m Josie who’s four and a
5 -> half
6 MO: yeah
7 FCA: is that right
8 FA: yeah=
9 MO: =yeah
10 FCA: .hh okay I just explain we’ve got-
11 we’ve an hour er:m maximum

In this sequence the child is invoked very briefly as the subject of the application (lines 4-6). It is significant that she is invoked first as an institutional category as 'erm: (0.5) o:ne child' about whom there is an application. Only then, and after a hesitation, is she introduced as an individual, with a name and an age. What is particularly interesting is that the mediator then seeks and achieves confirmation of these basic facts from both parents. By doing so the mediator has built some limited consensus between the parents in relation to the child. The child has, in effect, been introduced without escalating the conflict. Having achieved that, the mediator then switches the focus away from the child onto the process by which resolution might be achieved. However, Josie’s lifeworld and her wishes, needs and preferences have not been explored nor flagged as central to decision-making.

Our analysis is consistent with previous work from a sociology of childhood perspective (e.g. Piper 2000; James et al 2004) emphasising the importance of generic child welfare discourses. However, we have extended and developed existing research by showing precisely how invocations of the child are deployed strategically – to ‘manage’ emotionality and pursue a mutually agreeable settlement of the dispute.

(c) ‘So presumably things have moved on since then?’ The interactional management of risk allegations in child contact dispute resolution. (Submitted to International Journal of Law, Policy and the Family)

As anticipated, the management of allegations of risk was an important part of the analysis of our materials. Indeed, allegations of domestic violence, sexual abuse and/or alcohol or drug dependency were raised in nine of the fifteen sessions. We were particularly interested in exploring how allegations were raised and subsequently managed. Previous research by Cobb (1997) and Greatbatch and Dingwall (1999) had found that allegations of risk were typically marginalised in mediation encounters. We found that despite greater emphasis on risk assessment in recent years that this marginalisation remains commonplace. We extended previous analyses by detailing precisely how this ‘marginalisation’ occurred and uncovering three distinctive behavioural patterns, namely:
1. Non-uptake: where allegations were presented in a mitigated or hesitant fashion by parents, CAFCASS officers did not attempt to elicit further information in order to make an informed assessment of the allegation. Instead, CAFCASS officers passed up opportunities to topicalise (elaborate upon) allegations, allowed the issue to drop or actively changed the topic away from the allegation.

2. Rewriting risk: alternatively CAFCASS officers responded to hesistantly-delivered allegations by downgrading, normalising or historicising concerns (e.g. extract 3 below).

3. Disputing risk: Where allegations were presented in a more specific and persistent fashion they invoked or elicited more proactive or assertive marginalising strategies from CAFCASS officers, including disputing or arguing with the person making the allegation, aligning with the ‘accused’ party, and querying the veracity of an allegation - with the result that the allegation was ultimately marginalised.

Our analysis has shed further light on how court-based mediators view their institutional role and the institutional task. What was clear was that despite all recent efforts to emphasise the importance of assessing risk, the CAFCASS officers saw their role primarily as facilitating an agreement and promoting or restoring contact, rather than assessing risk (Bailey-Harris et al 1999). The allegations that the CAFCASS officers were presented with often lacked detail or specificity. However, CAFCASS officers appeared to use this lack of specificity as a reason to discount allegations, rather than as an opportunity to elicit further detail in order to assess the validity, seriousness and relevance of concerns. In this way, the institutional task clearly differs from other settings where allegations are presented - for example in calls to the NSPCC child protection helpline (Potter & Hepburn, 2003). In contrast with the CAFCASS officers in our study, the child protection officers in Potter and Hepburn’s study actively collaborate with the caller to help unpack and assess the initial ‘concern’ (or allegation) rather than closing down, repackaging or disputing the caller’s concern.

2. Managing conflict

Much of the framing work done by mediators is ultimately about managing conflict by ruling out or avoiding contentious topics. However we were also interested in what mediators did when conflict, specifically anger, erupted in the sessions.

(a) Mediators’ methods for managing anger: Circumventing, curtailing and containing conflict in child-contact conciliation (Submitted to Research on Language and Social Interaction)

This article showed how conflict and anger lie at the heart of child-contact mediation meetings. For example, from the outset of the meetings, mediators display an orientation to the likelihood that existing conflicts between the parents will surface during the meeting and impede the mediation process. Thus, we showed how mediators deploy a variety of methods that attempt to prevent conflict breaking out onto the surface of the interaction. These methods included instructing parents on ‘groundrules’ (that state, for example, that parents should not ‘interrupt’ one another and must ‘listen to the other side’), eliciting viewpoints in ways that downgrade antagonism, instructing parents to ‘focus on the future’, paraphrasing the parents’ positions in a less confrontational manner, and more besides. We then showed what happens when conflicts between the parents surface in the mediation meetings. We saw that, when this happens, mediators have at their disposal a range of discursive and paralinguistic methods that seek to curtail and contain conflict – including topic shifting, interrupting, producing imperatives (such as ‘please
stop arguing!) and pausing. The following extract offers a vivid example of the ‘work’ that mediators do – both proactively and retroactively to manage conflict and anger:

59 Mediator  i mean could you
60  kick off by saying why- why you’ve
61  made the application and what you (.)
62  wish to get (. ) from today?
63 Father:  why’ve ye stopped me from seeing the
64  kids?
65  (1)
66 Mother:  "i’avn’t stopped you from seeing the
67  kids
68  (0.7)
69 Father:  yesh you ‘ave
70  (1)
71 Mediator: okay mi—
72 Father:  =s- - (norma) i asked you a question
73  (.) could you (0.5) answer it please
74  what she==
75 Mediator: what do you want from today:?
76  (0.5)
77 Father:  i wa- i want erm (0.5) see me kids
78  overnight access once every two:
79  weeks (1)

First, note how, in line 59, the mediator elicits talk from the father: by emphasizing informality (hence ‘just kick off’ – line 60), and by using the words ‘wish to get from today’ (rather than, say, ‘want’ or ‘need’, or ‘demand’), which is future-oriented (this future-orientation is important, given the likelihood of a fraught relationship history between the parents), while alluding to aspiration rather than any kind of ‘demand’. The mediator’s turn, then, projects not only a particular next action, but also a particular next attitude. Such projections, though, are not guaranteed to succeed, as we see from the father’s utterance in lines 63-64 which is, significantly, directed at the mother, rather than the mediator. The father produces a bald, direct question to the mother, and appears to be antagonistic in tone. This seems to be recognised by the mother, who responds in kind, with a bald and unmitigated dismissal, in lines 66-67. The antagonism continues into the next turn, with the father’s ‘yesh you have’ (line 69), again directed at the mother. It is at this juncture that the mediator makes an attempt at intervention, but this is not successful, as witnessed by the father’s utterance once again directed to the mother, at lines 72-74. On this occasion, before the mother has an opportunity to intervene, the mediator makes a more forceful intervention (line 75).

Such analyses allow us to witness some of the ways in which mediators manage conflict and antagonism within the meetings. Conflict, anger and antagonism, we argued, are omnirelevant elements that ‘lurk’ under the surface of the mediation meetings. Mediators, we posited, appear to demonstrate an ongoing awareness of the ‘conflict implicativeness’ of their own as well as parents’ utterances, and take action to circumvent, curtail and contain conflict. The article cast much-needed empirical light on how mediators – in pursuit of an agreed settlement - proactively and retroactively manage emotionality.
3. Pursuing Resolution

The third strand of our work concerns the methods by which mediators actively pursue or achieve resolution. This strand has focused specifically on the use of formulation by mediators. We have further work planned on closings.

(a) Formulation as resolution: Some ways in which child-contact mediators pursue agreement (In preparation for *Discourse and Society*)

One method by which mediators seek to find mutually agreeable and durable resolution is through the use of formulations, that is paraphrasing and relexicalising the disputing parents' positions, viewpoints, and arguments. In each case, though, we observe that the mediators' formulations transform the parents' talk in ways that are less emotional, less antagonistic, and more consensus-seeking than when the utterances were originally produced by the parent(s) (as disputants). Thus, in our data, we see how the mediators' formulations effectively 'neutralise' emotionality, stress common ground and provide for instruction and 'agreeable' courses of action – while also creating the impression that it is the parents themselves who have created opportunities for agreement.

The following extract exemplifies how formulations are deployed in order to reduce antagonism and find 'common ground' between the disputing parties. The mediator's formulation is arrowed in the transcript:

Extract 3 – Tape B

175 Mother: we had contact with John .hh and er
176 he was gettin' verbally aggressive,
177 the police got called, things like
178 that this was in the beginning (.)
179 .hh erm=
180 Mediator: =and that was about two years [ago]
181 Mother:                      [that]
182 Mediator:      [yeah]
183 Mother: it's sort of (.) it's snowballed
184 Mediator: [ (to me) since then y'know]
185 [ I mean yeah: I mean one ]
186 Mediator: of the important things is that you-
187 -> with with children (.) well when (.)
188 -> relationships break down often
189 -> there’s a lot of (0.5)
190 -> [anger] around [at that] time
191 Mediator: [yeah] [“yeah” ]
192 Mother: but (.) y’know then (.) you have to
193 Mediator: move forward an- an’ try (0.5) to put
194 Mediator: [yeah]
195 Mother: [yeah]
196 Mediator: [yeah]

In the lines arrowed, the mediator responds to both the father's turn (this turn is not reproduced), and the mother's account of antagonism between them. The mediator's response is to formulate both parents' descriptions as 'a lot of anger around at that time'. Thus the detailed narratives are transformed as 'anger', as past-occurrences, as occurrences that are 'normal' in relationship breakdowns, and as occurrences that have impacted upon both parents. From the mother's subsequent 'yeah, yeah', the formulation appears to have been recognised to function in this way. Once 'common ground' has been established, and once the preceding narratives have been reformulated as 'anger
around at that time', the mediator instructs the parents in how to react henceforth, thus: 'you know, you have to move forward and try to put that to one side'. It is worth noting, of course, that the 'neutralising' of anger is not a neutral intervention by the mediator and indeed is an example of how risk is rewritten in these encounters (see above).

Formulations are thus discursive resources that the participants are able to utilise in order to explore and subsequently establish agreement. They are important discursive methods at the mediators’ disposal, and are almost invariably deployed during phases of the mediation meetings where 'resolutions' or 'solutions' are being actively touted and discussed.

Conclusions and implications

The research we have produced within the three strands significantly enhances our understanding of how child-contact mediations are undertaken through spoken interaction. We have uncovered how mediation meetings commence, and explicated the dense institutional work – which includes ‘socialising’ the parents in the mediation process - that takes place within the first few minutes of the meetings. We have examined how ‘children’, though absent from the actual meetings, are invoked, in a variety of ways, within the meetings, and connected these invocations to the overarching expedient pursuit of a durable settlement of the parents’ disputes. We have uncovered how the delicate notion of ‘risk’ prefigures as a key component in the meetings, and described how institutional mandates to reach a settlement often override the apparent need for mediators to probe and investigate allegations of harm. We have demonstrated how closely-related notions of anger, conflict, and emotionality are omnirelevant in child-contact mediation meetings, and uncovered the complex ways in which mediators proactively and retroactively ‘manage’ emotions in order to promote conflict resolution rather than conflict escalation. We have examined how formulations are deployed resourcefully and strategically by mediators, in the way formulations are used to enhance agreement and ultimately secure a mutually acceptable and workable outcome.

Our work contributes to a small, though growing, amount of CA research on child-contact mediation and as such extends methodologically and empirically broadens Conversation analytic studies of conflict, institutional forms of talk, lay-professional interactions, and mediation more generally. The findings also add significantly to the socio-legal literature examining trends in family law. In particular, we have explored how the settlement orientation and contact presumption of the family justice system (Bailey-Harris et al 1999) are operationalised at the micro-level. Our findings have important practical implications for policy and practice and indeed have already begun to have an impact on policy, particularly on risk assessment.

Activities

We organised a symposium on Conflict Resolution and Mediation in Talk-in-Interaction at Newcastle University in June 2008. Presenters included Firth (Newcastle), Edwards & Stokoe (Loughborough), Bilmes (Hawaii), Hansen and Bysouth (Nottingham), Hepburn and Potter (Loughborough).

We presented seven conference papers in 2008:


We invited a number of prominent CA scholars to visit Newcastle during 2008 in order to work with us on our data, including Hepburn and Potter (Loughborough) and Ian Hutchby (Leicester).

We undertook a number of activities to communicate findings to policy-makers and practitioners (see Impacts below).

**Outputs**


Jenks, C., Firth, A., & Trinder, L., Talking children into being in absentia? Submitted to *Childhood*.

Jenks, C., Firth, A., & Trinder, L. Verbal sparring: displaying anger in child-contact disputes. Submitted to *Discourse Studies*.

Trinder, L., Firth, A. & Jenks, C. ‘So presumably things have moved on since then?’ The interactional management of risk allegations in child contact dispute resolution. Submitted to *International Journal of Law, Policy and the Family*.

**Impacts**

The research was extremely timely. In 2008 Sir Mark Potter, President of the Family Division, initiated a fundamental review of the private law programme (encompassing conciliation). The review has been conducted by the Private Law Working Group with membership of senior judges and CAFCASS. At the group’s request we have been able to feed in findings from the current study, including a draft version of our paper on risk management. The paper was described by a working group member as “a powerful piece of evidence” that reinforced the need to undertake any risk identification away from court and before the first hearing. The group subsequently adopted that position.
We conducted two feedback sessions for CAFCASS staff in February 2009:

1. An invited 45 minute presentation on findings and practice implications at the CAFCASS research conference, NEC, Birmingham. The session, one of six, was selected by nearly 200 of the 450 delegates.

2. A full day workshop attended by senior CAFCASS managers, the research director and the practitioners who had originally collected the data. The workshop aimed (1) to feedback findings from the study, especially regarding children and risk assessment, (2) to engage CAFCASS with CA as a methodology and explore its potential as a research and practice development tool.

The two events were very positively received. We are now in discussions with CAFCASS about further dissemination and an extension of the research in the form of follow-up funding.

We are preparing an article summarising key findings for the very influential professional journal *Family Law*. This journal has a wide circulation amongst policy-makers and practitioners in the field and will have a wider reach and impact.

**Future Research Priorities**

Priorities for future research include:

- Comparative studies of out-of-court or community based mediation
- Comparative analysis of child-focused and child-inclusive mediation
- Lawyer-parent encounters.
References


